No. 2420

United States

Circuit Court of Appeals

For the Ninth Circuit.

BALAKLALA CONSOLIDATED COPPER COMPANY, a Corporation,

Plaintiff in Error,

vs.

J. E. REARDON, Administrator of the Estate of FRANK WHITSETT, Deceased,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the Northern District of California, Second Division.

FILMER BROS. CO. PRINT, 330 JACKSON ST., S. F., CAL.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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was engaged in tunneling, working and operating that certain mine commonly known as and [1*] called the "Balaklala Mine," near Coram, California.

V.

That prior to said 9th day of March, 1909, the aforesaid Frank Whitsett, then aged twenty-one (21) years, or thereabouts, was employed by the said defendant, Balaklala Consolidated Copper Company, as a miner, driller and laborer, to work in said defendant's mine, and that said Frank Whitsett was on said 9th day of March, 1909, in pursuance of said contract of employment, and at No. 400 level, and as such miner, driller and laborer, engaged in the work of operating a drill in a tunnel in said mine for said defendant corporation.

VI.

That the said defendant, Balaklala Consolidated Copper Company, failed and neglected to exercise ordinary care in providing and maintaining a safe, suitable and proper place for the said Frank Whitsett to perform his said labor as aforesaid, and particularly in this:

That on the 9th day of March, 1909, while the said Frank Whitsett was so working as a miner, driller and laborer for the said defendant, Balaklala Consolidated Copper Company, in operating a drill at the face of the tunnel in pursuance of the said employment and at a place where he was required and directed by said defendant to work, the drill so operated by him ran into and exploded a charge of

*Page-number appearing at foot of page of original certified Record.

powder, then and at all times theretofore unknown to the said Frank Whitsett, and the said Frank Whitsett was thereby killed.

VII.

That the unsafeness of the place where the said Frank Whitsett was killed could have been by said defendant, Balaklala Consolidated Copper Company, discovered and known by the use and exercise by it of ordinary care and diligence, but the [2] same was unknown to the said Frank Whitsett.

VIII.

That the plaintiff herein was wholly dependent upon the said Frank Whitsett for subsistence and support, and by reason of his death is left utterly helpless and destitute and is damaged in the sum of Fifty Thousand ($50,000.00) Dollars.

WHEREFORE, plaintiff prays judgment against the Balaklala Consolidated Copper Company, defendant, in the sum of Fifty Thousand ($50,000.00) Dollars, and for his costs of action herein incurred.

C. S. JACKSON and
T. W. H. SHANAHAN,
Attorneys for Plaintiff.

State of California,
County of Shasta,—ss.

T. W. H. Shanahan, being duly sworn, says as follows:

1. I am one of the attorneys of the plaintiff in this action.

2. I have read the foregoing complaint and know the contents thereof and it is true of my own knowledge, except as to those matters therein stated on in-

formation and belief, and as to those matters, I believe it to be true.

3. The reason this verification is not made by the plaintiff is that he is not within the county of Shasta, which is the county where I reside.

T. W. H. SHANAHAN.

Subscribed and sworn to before me this 8th day of March, 1910.

[Seal of Said Superior Court]

S. N. WITHEROW,
Clerk. [3]

[Endorsed]: No. 4146. File 218. In the Superior Court of the State of California, County of Shasta. Department No. 2. Filed Mar. 8, 1910. S. N. Witherow, Clerk. By W. O. Blodgett, Deputy Clerk. [4]

In the Superior Court of the County of Shasta, State of California, Department 2.

JAMES WHITSETT,

Plaintiff,

vs.

BALAKLALA CONSOLIDATED COPPER COMPANY, a Corporation, JOHN DOE and RICHARD ROE,

Defendants.

Summons.

Action brought in the Superior Court of the County of Shasta, State of California, and the Complaint filed in said County of Shasta in the office of the Clerk of said Superior Court.

The People of the State of California Send Greeting to Balaklala Consolidated Copper Company, a Corporation, John Doe and Richard Roe, Defendants.

You are hereby required to appear in an action brought against you by the above-named plaintiff in the Superior Court of the County of Shasta, State of California, and to answer the Complaint filed therein, within ten days (exclusive of the day of service) after the service on you of this Summons, if served within said County; if served elsewhere, within thirty days.

And you are hereby notified that if you fail to appear and answer, the plaintiff will take judgment for any money or damages demanded in the Complaint as arising upon contract, or will apply to the Court for any other relief demanded in the Complaint.

Witness my hand and seal of said Superior Court of the County of Shasta, State of California, this 8th day of March, A. D. 1910.

[Seal of said Superior Court.]

S. N. WITHEROW,
Clerk. [5]

[Endorsed]: Filed Apr. 27, 1910. S. N. Witherow, Clerk. By W. O. Blodgett, Deputy Clerk.

Rec'd. Mar. 17, 1910—*190*—at 3:30 P. M.

J. L. MONTGOMERY,
Sheriff.
By Alex. Ludwig,
Deputy. [6]

Sheriff's Office,
County of Shasta,
State of California,—ss.

I hereby certify that I received the within Summons on the 17th day of March, A. D. 1910, and personally served the same upon the Balaklala Consolidated Copper Company, a corporation, by delivering to and leaving with R. T. White, the managing agent of the said Balaklala Consolidated Copper Company, a corporation, in the County of Shasta, State of California, on the 25th day of April, A. D. 1910, a copy of said Summons; and that the copy Summons, so delivered to and left with said R. T. White, as managing agent of said defendant corporation, was attached to a copy of the Complaint in said action.

Dated at Redding, Calif., this 26th day of April, A. D. 1910.

JAS. L. MONTGOMERY,
Sheriff.

Sheriff's Fee, $.75¢. [7]

In the Superior Court of the County of Shasta, State of California.

JAMES WHITSETT,
Plaintiff,

vs.

BALAKLALA CONSOLIDATED COPPER COMPANY, a Corporation, JOHN DOE and RICHARD ROE,
Defendants.

Notice of Motion for Order of Removal.

To Messrs. C. S. Jackson and T. W. H. Shanahan, Attorneys for Plaintiff.

Please take notice that the defendants, Balaklala Consolidated Copper Company, a corporation, John Doe and Richard Roe, will, on Saturday, the 14th day of May, 1910, at ten o'clock A. M., or as soon thereafter as counsel can be heard, move the Court, at the courtroom thereof, at Redding, in the county of Shasta, State of California, for an order removing said cause to the Circuit Court of the United States, for the Ninth Circuit, Northern District of California, in accordance with the petition of the defendants, a copy of which is hereto attached.

Dated this 3d day of May, A. D. 1910.

C. H. WILSON,

Attorney for Defendants, Balaklala Consolidated Copper Company, a Corporation, John Doe and Richard Roe. [8]

In the Superior Court of the County of Shasta, State of California.

JAMES WHITSETT,

Plaintiff,

vs.

BALAKLALA CONSOLIDATED COPPER COMPANY, a Corporation, JOHN DOE and RICHARD ROE,

Defendants.

Petition for Removal to United States Circuit Court on Ground of Diverse Citizenship.

To the Honorable Superior Court of Shasta County, State of California:

The petition of the Balaklala Consolidated Copper Company, a corporation, and John Doe and Richard Roe, the defendants in the above-entitled action, respectfully shows to this Honorable Court:

That your petitioners are the defendants in the above-entitled action.

That said action has been begun against them in the above-entitled court by said plaintiff, and that said action is of a civil nature.

That plaintiff in his complaint herein claims in substance: That on the 9th day of March, 1909, the defendant, Balaklala Consolidated [9] Copper Company, was engaged in tunnelling, working and operating a certain mine known as the Balaklala Mine, near Coram, California. That on said day Frank Whitsett was employed by the said defendant to work in said mine, and on said day was engaged in the work of operating a drill in a tunnel in said mine, and that on said day said Balaklala Consolidated Copper Company failed and neglected to exercise ordinary care in providing and maintaining a safe, suitable and proper place for said Frank Whitsett to perform his said labor, and that while so working in said tunnel and operating the drill aforesaid, it ran into and exploded a charge of powder, thereby causing the death of said Frank Whitsett. That the plaintiff is the father and heir at law of said Frank

Whitsett, and by reason of his death has been damaged in the sum of Fifty Thousand Dollars ($50,000.00). That no cause of action is stated in said complaint against the defendant, John Doe and Richard Roe.

That your petitioners dispute said claim and deny that said defendant, Balaklala Consolidated Copper Company, was careless or negligent in any manner proximately or at all causing the accident and death complained of, and deny any and all liability in law to respond in damages to the claim of the plaintiff as set forth in said complaint.

That the matter in dispute in this action exceeds the sum of Two Thousand Dollars ($2,000.00), exclusive of interest and costs.

That the controversy in this action and every issue of fact and law therein is wholly between citizens of different states and which can be fully determined as between them, that is to say: The plaintiff, James Whitsett, is now and was at the time of the filing of the complaint in this action, a citizen and [10] resident of the State of California, and that the defendant, the Balaklala Consolidated Copper Company, a corporation, was then and still is a corporation duly organized and doing business under and by virtue of the laws of the State of Nevada, and a citizen and resident of the State of Nevada, and that the defendants, John Doe and Richard Roe, were then and still are citizens and residents of the State of Nevada.

That the time for your petitioners, as defendant in this action, to answer or plead to the complaint

in this action, has not yet expired, and will not expire until the 5th day of May, 1910, and your petitioners have not yet filed or in any way appeared therein.

That your petitioners herewith present a good and sufficient bond, as provided by the statute in such cases, that it will, on or before the first day of the next ensuing session of the United States Circuit Court for the Ninth Circuit, Northern District of California, file therein a transcript of the record of this action, and for the payment of all costs which may be awarded by the said Court, if the said Circuit Court shall hold that said suit was wrongfully or improperly removed thereto.

Your petitioners, therefore, pray that this Court proceed no further herein, except to make the order of removal, as required by law, and to accept the bond presented herewith, and direct a transcript of the record herein to be made for said Court, as provided by law, and as in duty bound your petitioners will ever pray.

Dated this 3d day of May, A. D. 1910.

BALAKLALA CONSOLIDATED COPPER COMPANY, a Corporation,
By C. H. WILSON,
Its Attorney. [11]

JOHN DOE,
By C. H. WILSON,
His Attorney.

RICHARD ROE,
By C. H. WILSON,
His Attorney.

C. H. WILSON,
Attorney for Defendants. [12]

State of California,
City and County of San Francisco,—ss.

C. H. Wilson, being duly sworn, deposes and says: That he is the attorney for the defendants in the above-entitled action; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on information or belief; and, as to such matters, that he believes it to be true. That the facts stated in said petition are within the knowledge of affiant.

C. H. WILSON.

Subscribed and sworn to before me, this 3d day of May, 1910.

[Notarial Seal] C. B. SESSIONS,
Notary Public in and for the City and County of San Francisco, State of California. [13]

[Endorsed]: No. 4146. 218. Filed, May 4, 1910. S. N. Witherow, Clerk. By W. O. Blodgett, Deputy. [14]

In the Superior Court of the County of Shasta, State of California.

JAMES WHITSETT,

Plaintiff,

vs.

BALAKLALA CONSOLIDATED COPPER COMPANY, a Corporation, JOHN DOE and RICHARD ROE,

Defendants.

Order of Removal.

This cause coming on for hearing upon the application of the defendants herein for an order transferring this cause to the United States Circuit Court for the Ninth Circuit, Northern District of California, and it appearing to the Court that the defendants have filed their petition for such removal in due form of law, and that the defendants have filed their bond duly conditioned with good and sufficient sureties, as provided by law, and it appearing to the Court that it is a proper case for removal to said Circuit Court,—

NOW, THEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that this cause be, and it hereby is, removed to the United States Circuit Court, for the Ninth Circuit, Northern District of California, and the Clerk is hereby directed to make up the record in said cause for transmission to said court forthwith.

Done in open court this 14th day of May, A. D. 1910.

J. E. BARBER,
Judge. [15]

In the Superior Court of the County of Shasta, State of California.

JAMES WHITSETT,

Plaintiff,

vs.

BALAKLALA CONSOLIDATED COPPER COMPANY, a Corporation, JOHN DOE and RICHARD ROE,

Defendants.

Bond on Removal.

KNOW ALL MEN BY THESE PRESENTS: That the undersigned,

UNITED SURETY COMPANY

a corporation duly organized and doing business under the laws of the State of Maryland, and duly licensed to transact the business of a surety company in the State of California, is held and firmly bound unto James Whitsett, plaintiff in the above-entitled cause, his heirs, personal representatives and assigns, in the sum of ONE THOUSAND DOLLARS, lawful money of the United States of America, for the payment of which well and truly to be made, the undersigned binds itself and its successors firmly by these presents.

THE CONDITIONS OF THIS OBLIGATION ARE SUCH, THAT

WHEREAS, the Balaklala Consolidated Copper Company, a Corporation, John Doe and Richard Roe, the defendants above named, have applied by petition to the Superior Court of the State of California, in and for the County of Shasta, for the removal of a certain cause therein pending wherein James Whitsett is plaintiff and the said Balaklala Consolidated Copper Company, a Corporation, and John Doe and Richard Roe are defendants, to the Circuit Court of the United States for the Ninth Circuit, Northern District of California, [16] for further proceedings on grounds in the said petition set forth, and that all further proceedings in said

action in said Superior Court be stayed.

NOW, THEREFORE, if your petitioners, the said Balaklala Consolidated Copper Company, a corporation, John Doe and Richard Roe, shall enter in said Circuit Court of the United States for the Ninth Circuit, Northern District of California, aforesaid, on or before the first day of the next regular session, a copy of the records of said suit, and shall pay or cause to be paid, all costs that may be awarded therein by said Circuit Court of the United States, if said Court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void, otherwise shall remain in full force and effect.

IN WITNESS WHEREOF, the said United Surety Company, a corporation, as aforesaid, has duly caused these presents to be signed with its corporate name and its corporate seal to be hereto affixed this 3d day of May, A. D. 1910.

UNITED SURETY COMPANY,
By D. DUNCAN,
Resident Vice-President.
Attest: J. M. HOYT,
Resident Ass't. Sec'y.

No. 4146. 218. Filed May 4, 1910. S. N. Witherow, Clerk. By W. O. Blodgett, Deputy. [17]

County Clerk's Office,
County of Shasta,—ss.

I, S. N. Witherow, County Clerk of the County of Shasta, and ex-officio Clerk of the Superior Court thereof, do hereby certify the foregoing to be a full and correct copy of the Complaint, Summons,

Sheriff's Return, Notice of Motion for Order of Removal, Petition for Removal to United States Circuit Court, Bond on Removal, and Order of Removal in James Whitsett, Plaintiff, vs. Balaklala Consolidated Copper Company, a Corporation, John Doe and Richard Roe, Defendants, now on file and of record in my office.

WITNESS my hand and the seal of said Court this 16th day of May, 1910.

[Seal] S. N. WITHEROW,
Clerk.
By W. O. Blodgett,
Deputy.

[Endorsed]: Filed July 6th, 1910. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk. [18]

In the Circuit Court of the United States in and for the Ninth Circuit, Northern District of California.

JAMES WHITSETT,
Plaintiff,
vs.
BALAKLALA CONSOLIDATED COPPER COMPANY, a Corporation, JOHN DOE and RICHARD ROE,
Defendants.

Demurrer [to Complaint].

Comes now the defendants above named and demur to the complaint of the plaintiff herein and as grounds for demurrer state and allege:

I.

That said complaint does not state facts sufficient to constitute a cause of action against the defendant Balaklala Consolidated Copper Company, a Corporation.

II.

That said complaint does not state facts sufficient to constitute a cause of action against the defendant John Doe.

III.

That said complaint does not state facts sufficient to constitute a cause of action against the defendant Richard Roe.

IV.

That said complaint is uncertain, inasmuch as it does not appear therein, nor can it be ascertained therefrom, who are the heirs at law of Frank Whitsett, deceased, nor does it appear therein nor can it be ascertained therefrom, [19] whether the plaintiff James Whitsett is the sole heir at law of said Frank Whitsett, deceased, or whether there are other heirs at law living and not joined as parties to this action.

WHEREFORE, these defendants pray that the complaint of the plaintiff herein be dismissed and that they have judgment for their costs and disbursements most wrongfully sustained.

Dated this 6th day of July, A. D. 1910.

C. H. WILSON,
Attorney for Defendants.

[Endorsed]: Filed Jul. 6, 1910. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk. [20]

At a stated term, to wit, the July term, A. D. 1912, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the courtroom in the City and County of San Francisco, on Monday, the 3d day of October, in the year of our Lord one thousand nine hundred and ten. Present: The Honorable WILLIAM C. VAN FLEET, Judge.

No. 15,144.

JAMES WHITSETT

vs.

BALAKLALA CONSOLIDATED COPPER CO. et al.

Order Sustaining Demurrer [to Complaint].

Defendant's demurrer to the complainant herein came on this day to be heard and after argument by counsel for both sides was submitted and being considered by the Court it was ordered that said demurrer be and the same is hereby sustained. [21]

In the Circuit Court of the United States, in and for the Ninth Circuit, Northern District of California.

No. 15,144.

J. E. REARDON, Administrator of the Estate of FRANK WHITSETT, Deceased, and JAMES WHITSETT,

Plaintiffs,

vs.

BALAKLALA CONSOLIDATED COPPER COMPANY, a Corporation, JOHN DOE and RICHARD ROE,

Defendants.

Amended and Supplemental Complaint.

The plaintiffs, by leave of the Court first had and obtained, file this, their amended and supplemental complaint, and for cause of action allege:

1. That Frank Whitsett died on the 9th day of March, 1909; that thereafter, to wit, on the 13th day of December, 1910, in the matter of the estate of said decedent, the Superior Court of the City and County of San Francisco, State of California, by its order duly given and made, appointed plaintiff, J. E. Reardon, Administrator of the Estate of Frank Whitsett, Deceased, and said J. E. Reardon thereupon qualified as such administrator and letters of administration, upon said estate, were thereupon issued to him; that said order has never been vacated, modified, nor set aside and said letters of administration have never been revoked and plaintiff is now and ever since the said 13th day of De-

cember, 1910, has been duly appointed, qualified, and acting Administrator of the Estate of Frank Whitsett, Deceased.

2. That the defendant, Balaklala Consolidated Copper Company, is and was, at all the times herein mentioned, a private corporation, duly organized and existing under and pursuant to the laws of the State of Nevada, and is now, and at all times herein mentioned was engaged in the business of mining and operating [22] a quartz mine situate in the county of Shasta, State of California.

3. That the defendants John Doe and Richard Roe are sued herein by fictitious names and plaintiffs pray that when their true names are ascertained they may be inserted herein with apt and proper words to charge them and each of them.

4. That on the 9th day of March, 1909, the said defendant, Balaklala Consolidated Copper Company, was engaged in tunneling, working and operating that certain mine commonly known as and called the "Balaklala Mine," near Coram, California.

5. That prior to said 9th day of March, 1909, the aforesaid Frank Whitsett, then aged twenty-one (21) years, or thereabouts, was employed by the said defendant, Balaklala Consolidated Copper Company, as miner, driller, and laborer, to work in said defendant's mine, and that said Frank Whitsett was, on said 9th day of March, 1909, in pursuance of said contract of employment, and at No. 400 level, and as such miner, driller and laborer, engaged in the work of operating a drill in a tunnel in said mine for said defendant corporation.

6. That the said defendant, Balaklala Consolidated Copper Company, failed and neglected to exercise ordinary care in providing and maintaining a safe, suitable, and proper place for the said Frank Whitsett to perform his said labor as aforesaid, and particularly in this:

That on the 9th day of March, 1909, while the said Frank Whitsett was working as a miner, driller, and laborer for the said defendant, Balaklala Consolidated Copper Company, in operating a drill at the face of the tunnel in pursuance of the said employment and at a place where he was required and directed by said defendant to work, the drill so operated by him ran into [23] and exploded a charge of powder, which had been negligently left in said position by said defendant, Balaklala Consolidated Copper Company, and the presence of which was then and at all times theretofore unknown to the said Frank Whitsett; that the said Frank Whitsett was killed by and as a result of said explosion.

7. That the unsafeness of the place where the said Frank Whitsett was killed could have been by said defendant, Balaklala Consolidated Copper Company, discovered and known by the use and exercise by it of ordinary care and diligence, but the same was unknown to the said Frank Whitsett.

8. That James Whitsett, father of said decedent, is the only heir at law of said Frank Whitsett, Deceased.

9. That James Whitsett, father of said decedent, was wholly dependent upon the said Frank Whitsett for subsistence and support, and by reason of

his death is left utterly helpless and destitute.

10. That by reason of the negligence of the defendant Balaklala Consolidated Copper Company in causing the death of said Frank Whitsett, as aforesaid, plaintiffs have sustained damages in the sum of Fifty Thousand ($50,000.00) Dollars.

WHEREFORE, plaintiffs pray judgment against said defendants in the sum of Fifty Thousand ($50,000.00) Dollars and for their costs of suit herein incurred.

C. S. JACKSON and
W. M. CANNON,
Attorneys for Plaintiffs. **[24]**

State of California,
City and County of San Francisco,—ss.

J. E. Reardon, being first duly sworn, deposes and says: That he is the administrator of the Estate of Frank Whitsett, Deceased, and one of the plaintiffs in the above-entitled action; that he has read the foregoing amended complaint and knows the contents thereof; that the same is true of his own knowledge except as to matters therein stated on information or belief, and that as to those matters he believes it to be true.

J. E. REARDON.

Subscribed and sworn to before me this 30th day of December, 1910.

[Seal] W. H. PYBURN,
Notary Public in and for the City and County of San Francisco, State of California.

Receipt of a copy of the within Amended and

Supplemental Complaint is hereby admitted this 30th day of December, 1910.

C. H. WILSON,
Attorney for said Defendant.

[Endorsed]: Filed Dec. 30, 1910. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk. [25]

In the Circuit Court of the United States, in and for the Ninth Circuit, Northern District of California.

J. E. REARDON, Administrator of the Estate of FRANK WHITSETT, Deceased, and JAMES WHITSETT,

Plaintiffs,

vs.

BALAKLALA CONSOLIDATED COPPER COMPANY, a Corporation, JOHN DOE and RICHARD ROE,

Defendants.

Demurrer to Amended and Supplemental Complaint.

Now come the defendants above named and demur to the complaint of the plaintiffs herein, and as grounds for demurrer state and allege:

I.

That said amended and supplemental complaint does not state facts sufficient to constitute a cause of action against the defendant Balaklala Consolidated Copper Company, a corporation.

II.

That said amended and supplemental complaint

does not state facts sufficient to constitute a cause of action against the defendant John Doe.

III.

That said amended and supplemental complaint does not state facts sufficient to constitute a cause of action against the defendant Richard Roe.

IV.

That there is a misjoinder of parties plaintiff **[26]** in said amended and supplemental complaint, inasmuch as the administrator is joined as a plaintiff with James Whitsett, the father and heir at law of Frank Whitsett, deceased, which heir at law has no right of action against the defendants.

V.

That said amended and supplemental complaint pretends to state a cause of action that is barred by the provisions of Section 340 of the Code of Civil Procedure.

VI.

That said amended and supplemental complaint is uncertain, inasmuch as it does not appear therein, nor can it be ascertained therefrom what sums of money the said Frank Whitsett provided for the subsistence and support of his father, James Whitsett.

WHEREFORE, these defendants pray that the amended and supplemental complaint of the plaintiffs herein be dismissed without leave to amend, and that they have judgment for their costs and disbursements herein most wrongfully sustained.

Dated this 9th day of January, 1911.

C. H. WILSON,
Attorney for Defendants.

Service of the within Demurrer and receipt of a copy thereof is hereby acknowledged this 9th day of January, 1911.

C. S. JACKSON and
W. M. CANNON,
Attorneys for Plaintiffs. **[27]**

[Endorsed]: Filed Jan. 10, 1911. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk. **[28]**

In the Circuit Court of the United States, in and for the Ninth Circuit, Northern District of California.

J. E. REARDON, Administrator of the Estate of FRANK WHITSETT, Deceased, and JAMES WHITSETT,

Plaintiffs,

vs.

BALAKLALA CONSOLIDATED COPPER COMPANY, a Corporation, JOHN DOE and RICHARD ROE,

Defendants.

Notice of Motion to Substitute.

To the Defendants in the Above-entitled Action, and C. H. Wilson, Esq., Their Attorney:

You and each of you will please take notice that on Monday, the 23d day of January, 1911, at the opening of the court on that day, or as soon thereafter as counsel can be heard, at the courtroom of the above-entitled Circuit Court, in the United States Postoffice and Courthouse Building, in the

City and County of San Francisco, State of California, we shall move the above-named court for an order substituting J. E. Reardon, administrator of the estate of Frank Whitsett, deceased, as plaintiff in the above-entitled action, in the place and stead of James Whitsett.

Said motion will be made on the ground that J. E. Reardon has been duly and regularly appointed administrator of the estate of said Frank Whitsett, deceased, since the commencement of the above-entitled action by said James Whitsett; and will be based on this notice of motion and on all the papers, records, files, and proceedings in said action.

Dated San Francisco, Cal., January 17, 1911.

W. M. CANNON and
C. S. JACKSON,
Attorneys for Plaintiffs. **[29]**

Receipt of a copy of the within Notice is hereby admitted this 19th day of January, 1911.

C. H. WILSON,
Attorney for Defendants.

[Endorsed]: Filed Jan. 23, 1911. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk. **[30]**

[Order Denying Motion to Strike and Sustaining, in Part, Demurrer to Amended and Supplemental Complaint, etc.]

At a stated term, to wit, the March term, A. D. 1911, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and

for the Northern District of California, held at the courtroom in the City and County of San Francisco, on Monday, the 29th day of May, in the year of our Lord one thousand nine hundred and eleven. Present: The Honorable WILLIAM C. VAN FLEET, Judge.

No. 15,144.

JAMES WHITSETT et al.

vs.

BALAKLALA CONSOLIDATED COPPER CO. et al.

Plaintiffs' motion for leave to substitute party plaintiff and defendants' demurrer to amended and supplemental complaint, and motion to strike out same heretofore heard and submitted being now fully considered, and the Court having rendered its oral opinion thereon, it was ordered, in accordance with said opinion, that said motion to strike out be, and the same is hereby, denied, and that said demurrer be, and the same is hereby, sustained (in part) with leave to plaintiff to file an amended complaint, if so advised, and that plaintiffs' motion for leave to substitute party plaintiff be granted. **[31]**

In the Circuit Court of the United States, for the Ninth Circuit, Northern District of California.

No. 15,144.

J. E. REARDON, Administrator of the Estate of FRANK WHITSETT, Deceased,

Plaintiff,

vs.

BALAKLALA CONSOLIDATED COPPER COMPANY, a Corporation, JOHN DOE and RICHARD ROE,

Defendants.

Second Amended Complaint.

The plaintiff, by leave of the Court first had and obtained, files this his second amended complaint, and for cause of action alleges:

1. That Frank Whitsett died on the 9th day of March, 1909; that thereafter, to wit, on the 13th day of December, 1910, in the matter of the estate of said decedent, the Superior Court of the City and County of San Francisco, State of California, by its order duly given and made, appointed plaintiff, J. E. Reardon, administrator of the estate of Frank Whitsett, deceased, and said J. E. Reardon thereupon qualified as such administrator and letters of administration upon said estate were thereupon issued to him; that said order has never been vacated, modified, nor set aside and said letters of administration have never been revoked and plaintiff is now and ever since the said 13th day of December, 1910, has been the duly appointed, qualified, and acting administrator of the

estate of Frank Whitsett, deceased.

2. That the defendant Balaklala Consolidated Copper Company is, and was at all the times herein mentioned, a private corporation, duly organized and existing under and pursuant to the laws of the State of Nevada, and is now, and at all times herein mentioned was, engaged in the business of mining and operating a quartz mine, situate in the county of Shasta, State of California. [32]

3. That the defendants John Doe and Richard Roe are sued herein by fictitious names, and plaintiff prays that when their true names are ascertained, they may be inserted herein with apt and proper words to charge them and each of them.

4. That on the 9th day of March, 1909, the said defendant Balaklala Consolidated Copper Company was engaged in tunneling, working, and operating that certain mine commonly known as and called the "Balaklala Mine," near Coram, California.

5. That prior to said 9th day of March, 1909, the aforesaid Frank Whitsett, then aged twenty-one years, or thereabouts, was employed by the said defendant Balaklala Consolidated Copper Company as miner, driller and laborer, to work in said defendant's mine, and that said Frank Whitsett was, on said 9th day of March, 1909, in pursuance of said contract of employment, and at No. 400 level, and as such miner, driller and laborer, engaged in the work of operating a drill in a tunnel in said mine for said defendant corporation.

6. That said defendant Balaklala Consolidated Copper Company failed and neglected to exercise

ordinary care in providing and maintaining a safe, suitable and proper place for the said Frank Whitsett to perform his said labor as aforesaid, and particularly in this:

That on the 9th day of March, 1909, while the said Frank Whitsett was working as a miner, driller, and laborer for the said defendant Balaklala Consolidated Copper Company, in operating a drill at the face of the tunnel, in pursuance of the said employment and at a place where he was required and directed by said defendant to work, the drill so operated by him ran into and exploded a charge of powder, which had been negligently left in said position by said defendant Balaklala Consolidated Copper [33] Company, and the presence of which was then and at all times theretofore unknown to the said Frank Whitsett; that the said Frank Whitsett was killed by and as a result of said explosion.

7. That the unsafeness of the place where the said Frank Whitsett was killed could have been by said defendant Balaklala Consolidated Copper Company discovered and known, by the use and exercise by it of ordinary care and diligence, but the same was unknown to the said Frank Whitsett.

8. That James Whitsett, father of said decedent, is the only heir at law of said Frank Whitsett, deceased.

9. That James Whitsett, father of said decedent, was wholly dependent upon the said Frank Whitsett for subsistence and support, and by reason of his death is left utterly helpless and destitute.

10. That by reason of the negligence of the de-

fendant Balaklala Consolidated Copper Company in causing the death of said Frank Whitsett, as aforesaid, plaintiff has sustained damage in the sum of Fifty Thousand Dollars ($50,000).

WHEREFORE, plaintiff prays judgment against said defendants in the sum of Fifty Thousand Dollars ($50,000), and for his costs of suit herein incurred.

C. S. JACKSON and
WM. M. CANNON,
Attorneys for Plaintiff. **[34]**

State of California,
City and County of San Francisco,—ss.

J. E. Reardon, being duly sworn, deposes and says: That he is the administrator of the estate of Frank Whitsett, deceased, and the plaintiff in the above-entitled action; that he has read the foregoing second amended complaint, and knows the contents thereof; that the same is true of his own knowledge, except as to matters therein stated on information or belief, and that as to those matters he believes it to be true.

J. E. REARDON.

Subscribed and sworn to before me, this 18th day of July, 1911.

[Seal] W. H. PYBURN,
Notary Public in and for the City and County of San Francisco, State of California.

Service and receipt of a copy of the within Second Amended Complaint is hereby admitted this 18th day of July, 1911.

C. H. WILSON,
Attorney for Defendant.

[Endorsed]: Filed July 18, 1911. Southard Hoffman, Clerk. [35]

In the Circuit Court of the United States, for the Ninth Circuit, Northern District of California.

No. 15,144.

J. E. REARDON, Administrator of the Estate of FRANK WHITSETT, Deceased,

Plaintiff,

vs.

BALAKLALA CONSOLIDATED COPPER COMPANY, a Corporation, JOHN DOE and RICHARD ROE,

Defendants.

Demurrer to Second Amended Complaint.

Now come the defendants above named, and demur to the second amended complaint of the plaintiff herein, and as grounds for demurrer state and allege:

I.

That said second amended complaint does not state facts sufficient to constitute a cause of action against the defendant Balaklala Consolidated Copper Company, a corporation.

II.

That said second amended complaint does not state facts sufficient to constitute a cause of action against the defendant, John Doe.

III.

That said second amended complaint does not state facts sufficient to constitute a cause of action against the defendant, Richard Roe. [36]

IV.

That said second amended complaint pretends to state a cause of action that is barred by the provisions of section 340 of the Code of Civil Procedure, inasmuch as the original complaint herein was filed by one James Whitsett, the father and heir at law of Frank Whitsett, deceased, mentioned in said second amended complaint, and that said James Whitsett had no cause of action to recover damages for the death of said Frank Whitsett, and that no amended complaint was filed herein within one year after the death of said Frank Whitsett, and that consequently the statute of limitations ran and a cause of action cannot now be stated by the administrator of said Frank Whitsett, deceased, under the provisions of section 1970 of the Civil Code.

V.

That said second amended complaint is uncertain inasmuch as it does not appear therein nor can it be ascertained therefrom what sums of money the said Frank Whitsett provided for the subsistence and support of his father James Whitsett.

WHEREFORE, these defendants pray that the second amended complaint of the plaintiff herein be dismissed without leave to amend, and that they have judgment for their costs and disbursements herein most wrongfully sustained.

Dated this 21st day of August, 1911.

C. H. WILSON,
Attorney for Defendants. [37]

CERTIFICATE OF COUNSEL.

The undersigned, counsel for the defendants in

the above-entitled action, does hereby certify that the foregoing demurrer to the second amended complaint herein is not filed for delay, and that in the opinion of said counsel the same is well taken in point of law.

Dated this 21st day of August, 1911.

C. H. WILSON,
Counsel for Defendant.

Receipt of a copy of Demurrer is hereby acknowledged this 21st day of August, 1911.

C. S. JACKSON and
W. M. CANNON,
Attorneys for Plaintiff.

[Endorsed]: Filed Aug. 22, 1911. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk. [38]

At a stated term, to wit, the November term, A. D. 1911, of the District Court of the United States of America, in and for the Northern District of California, Second Division, held at the courtroom in the City and County of San Francisco, on Tuesday, the 2d day of January, in the year of our Lord one thousand nine hundred and twelve. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 15,144.

J. E. REARDON, Admr., etc.,

vs.

BALAKLALA CONSOLIDATED COPPER CO. et al.

Order Overruling Demurrer [to Second Amended Complaint and Denying Motion to Strike].

Defendant's demurrer to the second amended complaint and motion to strike out parts of second amended complaint heretofore heard and submitted being now fully considered and the Court having rendered its opinion in writing it was ordered, in accordance therewith, that said demurrer be overruled and that said motion to strike out be denied. [39]

In the District Court of the United States, for the Ninth Circuit, Northern District of California.

No. 15,144.

J. E. REARDON, Administrator of the Estate of FRANK WHITSETT, Deceased,

Plaintiff,

vs.

BALAKLALA CONSOLIDATED COPPER COMPANY, a Corporation, JOHN DOE, and RICHARD ROE,

Defendants.

Answer to Second Amended Complaint.

Now come the defendants above named and for their answer to the second amended complaint of the plaintiff herein admit, deny, state and allege as follows, to wit:

I.

These defendants admit each and every allegation, matter and thing contained in paragraphs one (1),

two (2), three (3), four (4) and five (5), except that these defendants have no information or belief upon the subject sufficient to enable them to answer the allegations of the second amended complaint in that behalf, and, placing their denials on that ground, deny that on and prior to said 9th day of March, 1909, the said Frank Whitsett was of the age of twenty-one years or thereabouts, and in that behalf alleges that these defendants are informed and believe, and on such information and belief allege, that on said day said Frank Whitsett was of the age of about twenty-three years. In like manner these defendants deny that on said day, or on any other day, said Frank Whitsett, [40] in pursuance of his contract of employment, or otherwise or at all, was engaged in the work of operating a drill, or other machine or appliance, in a tunnel, or elsewhere, in the mine described in the second amended complaint, or in any mine, for the defendant corporation, or for any person or persons.

II.

Defendants expressly deny that the defendant, Balaklala Consolidated Copper Company, failed and neglected, or failed or neglected, to exercise ordinary, or any, care in providing and maintaining, or providing or maintaining, a safe, suitable and proper, or safe or suitable or proper, place for the said Frank Whitsett to perform his said, or any labor, as in the second amended complaint alleged, or otherwise or at all, or particularly in this, that on the 9th day of March, 1909, or on any other day, while the said Frank Whitsett was working as a miner,

driller and laborer, or miner or driller or laborer, or otherwise or at all, for the defendant corporation in operating a drill, or any appliance, at the face of the tunnel, or elsewhere, in pursuance of the said, or any, employment or at a place where he was required and directed, or required or directed, by the said defendant corporation to work, or at any other place, the drill so, or in any manner, operated by him ran into and exploded, or ran into or exploded, a charge of powder, which had been negligently, or at all, left in said, or any, position by said defendant corporation, or the presence of which was then and at all times, or then or at any time or times, theretofore, or at all, unknown to said Frank Whitsett. In like manner deny that said Frank Whitsett was killed by or as a result of said exploding, or of any explosion, occurring as [41] described or set forth in plaintiff's second amended complaint.

III.

In like manner these defendants deny that the unsafeness of the place where said Frank Whitsett was killed, or of any other place, could have been or was by the defendant corporation discovered and known, or discovered or known, by the use and exercise, or use or exercise, by it of ordinary, or any, care and diligence, or care or diligence, but that the same was unknown to said Frank Whitsett.

IV.

These defendants have no information or belief upon the subject sufficient to enable them to answer the allegations of the second amended complaint in that behalf, and, placing their denials on that

ground, deny that James Whitsett is the father of said decedent, or that he is the only, or any, heir at law of said Frank Whitsett, deceased. In like manner deny that said James Whitsett was wholly, or at all, dependent upon said Frank Whitsett for subsistence and support, or subsistence or support, or that by reason of his death, or otherwise or at all, said James Whitsett is left utterly helpless and destitute, or helpless or destitute.

V.

These defendants expressly deny that by reason of *of* the negligence of the defendant corporation in causing the death of said Frank Whitsett, as in the second amended complaint alleged, or otherwise or at all, plaintiff has sustained damage in the sum of Fifty Thousand Dollars, or in any other sum or amount, whatsoever.

VI.

Further answering, these defendants deny that they, or **[42]** either of them, were guilty of any carelessness or negligence whatsoever, as in the second amended complaint alleged, or otherwise or at all, whereby Frank Whitsett was hurt or injured or killed or damaged in any particular or manner, whatsoever, or whereby James Whitsett was damaged in any particular or to any extent, whatsoever.

VII.

Further answering these defendants allege that the second amended complaint of the plaintiff does not state facts sufficient to constitute a cause of action against the defendants, John Doe and Richard Roe, or either of them.

VIII.

For a further and separate defense herein, these defendants allege that they were not guilty of carelessness, negligence or improper conduct, as in the second amended complaint alleged, or otherwise or at all, and say that the injuries therein described, if any there were, were caused by the fault and negligence of said Frank Whitsett.

IX.

For a further and separate defense herein, these defendants allege that they were not guilty of carelessness, negligence or improper conduct, as in the second amended complaint alleged, or otherwise or at all, and say that the injuries and death therein described, if any there were, were the result of and due to the fact that said Frank Whitsett encountered obvious or known risks or dangers which were incident to the work in which he was employed at the time of the accident described in the said second amended complaint, and which risks or dangers had been and were assumed by said Frank Whitsett in his contract of employment. **[43]**

X.

For a further and separate defense herein, these defendants allege that they were not guilty of carelessness, negligence or improper conduct, as in the second amended complaint alleged, or otherwise or at all, and say that the injuries and death therein described, if any there were, were caused by the fault and negligence of a coemployee of said Frank Whitsett.

WHEREFORE, these defendants pray that the second amended complaint of the plaintiff herein be dismissed, and that they have judgment for their costs and disbursements herein most wrongfully sustained.

Dated this 9th day of February, 1912.

C. H. WILSON,
Attorney for Defendants. **[44]**

State of California,
City and County of San Francisco,—ss.

E. B. Braden, being duly sworn, deposes and says: That he is an officer, to wit, the General Manager of Balaklala Consolidated Copper Company, a corporation, one of the defendants in the above-entitled action; that he has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on information or belief; and, as to such matters, that he believes it to be true.

E. B. BRADEN.

Subscribed and sworn to before me this 10th day of February, 1912.

[Seal] CHARLES EDELMAN,
Notary Public in and for the City and County of San Francisco, State of California.

My Commission Expires April 9th, 1914.

Service of the within Answer to Second Amended Complaint and receipt of a copy thereof is hereby acknowledged this 10th day of February, 1912.

C. S. JACKSON and
W. M. CANNON,
Attorneys for Plaintiff.

[Endorsed]: Filed Feb. 10, 1912. Jas. P. Brown, Clerk. By J. A. Schaertzer, Deputy Clerk. **[45]**

In the District Court of the United States, Northern District of California, Second Division.

No. 15,144.

J. E. REARDON, Administrator of the Estate of FRANK WHITSETT, Deceased,

Plaintiff,

vs.

BALAKLALA CONSOLIDATED COPPER COMPANY, a Corporation,

Defendant.

Verdict.

We, the jury, find in favor of the plaintiff and assess the damages against the defendant in the sum of Thirty-five Hundred ($3,500.00) and no/100 Dollars.

JOHN T. FOGARTY,

Foreman.

[Endorsed]: Filed May 23, 1912. Jas. P. Brown, Clerk. By W. B. Maling, Deputy Clerk. **[46]**

In the District Court of the United States, in and for the Northern District of California, Second Division.

No. 15,144.

J. E. REARDON, Administrator of the Estate of FRANK WHITSETT, Deceased,

Plaintiff,

vs.

BALAKLALA CONSOLIDATED COPPER COMPANY, a Corporation, JOHN DOE and RICHARD ROE,

Defendants.

Judgment on Verdict.

This cause having come on regularly for trial upon the 16th day of May, 1912, being a day in the March, 1912, Term of said court, before the Court and a jury of twelve men, duly impaneled and sworn to try the issue joined herein, William A. Cannon and C. S. Jackson, Esqs., appearing as attorneys for the plaintiff, and Charles H. Wilson, Esq., and Messrs. Chickering & Gregory, appearing as attorneys for defendant, and the trial having been proceeded with on the 17th, 21st, 22d, and 23d days of May, all in said year and term, and evidence oral and documentary upon behalf of the respective parties having been introduced and closed, and the cause, after arguments of the attorneys and the instructions of the Court, having been submitted to the jury and the jury having subsequently rendered the following

verdict, which was ordered recorded, namely: "We, the jury, find in favor of the plaintiff and assess the damages against the defendant in the sum of Thirty-five Hundred ($3,500.00) and no/100 Dollars. John T. Fogarty, Foreman," and the Court having ordered that judgment be entered in accordance with said verdict and for costs: **[47]**

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that J. E. Reardon, administrator of the estate of Frank Whitsett, deceased, plaintiff, do have and recover of and from the Balaklala Consolidated Copper Company, a corporation, the sum of Three Thousand Five Hundred ($3,500.00) Dollars, together with his costs in this behalf expended, taxed at $266.40.

Judgment entered May 23, 1912.

JAS. P. BROWN,
Clerk.
By W. B. Maling,
Deputy Clerk.

A true copy.

[Seal] Attest: JAS. P. BROWN,
Clerk.
By W. B. Maling,
Deputy Clerk.

[Endorsed]: Filed May 23d, 1912. Jas. P. Brown, Clerk. By W. B. Maling, Deputy Clerk. **[48]**

In the District Court of the United States for the Northern District of California.

No. 15,144.

J. E. REARDON, Admr., etc.,

vs.

BALAKLALA CONSOLIDATED COPPER COMPANY et al.

Certificate to Judgment-roll.

I, Jas. P. Brown, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing papers hereto annexed constitute the judgment-roll in the above-entitled action.

Attest my hand and the seal of said District Court, this 23d day of May, 1912.

[Seal] JAS. P. BROWN,
Clerk.
By J. A. Schaertzer,
Deputy Clerk.

[Endorsed]: Filed May 23d, 1912. Jas P. Brown, Clerk. By J. A. Schaertzer, Deputy Clerk. **[49]**

In the District Court of the United States, Northern District of California, Second Division.

J. E. REARDON, Administrator, etc.,
Plaintiff,

vs.

BALAKLALA CONSOLIDATED COPPER COMPANY, a Corporation, et al.,
Defendants.

Opinion and Order Overruling Demurrer and Denying Motion to Strike Amended Complaint from Files.

WILLIAM CANNON and C. S. JACKSON, for Plaintiff.

C. H. WILSON, for Defendants.

VAN FLEET, District Judge:

This is an action to recover for the death of an employee alleged to have been caused by the negligence of the employer. Section 1970 of the Civil Code of the State requires that such an action be maintained in the name of the legal representative of the deceased employee for the benefit of the next of kin in a certain order of precedence; and this is deemed the exclusive remedy. In this instance the father, being the next of kin and entitled to the benefit of the recovery, erroneously brought the action in his own name instead of that of the administrator of the deceased, under the mistaken supposition that the case fell within Section 377 of the Code of Civil Procedure; and before the error was established by a ruling on defendant's demurrer to that complaint, the time within which a new action could be commenced by the administrator had elapsed. The sole question [50] presented here calling for consideration is whether under these circumstances it was competent to allow the complaint to be amended by substituting the administrator as plaintiff in the action so commenced, in place of the father, and thus avoid bringing a new

action; or should the action have been dismissed. As the result of an application to that end, the Court heretofore allowed such substitution, and an amended complaint having been since filed in the name of the administrator, a demurrer thereto and motion to strike the same from the files is now interposed, and the question as to the propriety of the ruling has, with the Court's permission, been re-argued.

It is again strenuously insisted that such a change in the sole party plaintiff is not the proper subject of an amendment; that in effect the action of the Court was to allow, under the guise of an amendment, a new action to be brought in the name of the administrator after the time had elapsed in which he could originally maintain it; and as the amendment has relation to the commencement of the action, it will, if sustained, have the effect to deprive defendants of the right to interpose the plea of the statute, which, as claimed, had ripened into a bar when the amendment was allowed. In another form, the objection is that the right of action being in its inception purely statutory and given exclusively to the legal representative, the bringing of the action in the name of the father was wholly nugatory and ineffectual to arrest the running of the statute; and to allow the substitution now is in legal effect to extend the statutory limitation for bringing the action by the administrator. This position is pressed with such ingenuity as to make it plausible, but I do not regard it as sound. As indicated in granting the leave, it **[51]** involves

an erroneous conception of the legal effect of the omission sought to be corrected, and a too narrow construction of the purpose and effect of the statutes, both State and Federal (C. C. P., sec. 473; R. S., sec. 954), in providing the extent and character of relief that may be afforded by way of amendment, to avoid mistakes of the nature of that here involved. It should be borne in mind, as then stated, that the substantive cause of action counted on in the amended complaint has not been changed; it remains precisely the same as that stated in the original pleading. No new facts are alleged as a ground of recovery, the only change being in the name of the plaintiff and the capacity in which he sues; while the father still remains the beneficiary of the recovery sought. This being so, the change effected by the amendment is obviously in no just sense the bringing of a new action; it is one of form rather than of substance, and in the interests of justice is to be treated as such, rather than to adopt a view which would result in an irretrievable bar to all remedy. Under the modern doctrine, the discretionary power of the Court to such end is to be liberally exerted in favor of, rather than against, the disposition of a case upon its merits; and I am entirely satisfied after my further examination of the question induced by the reargument that, under the broad and comprehensive terms of Section 954, if not as well under the statute of the State, the defect involved is one which may be cured by amendment. It will not be necessary in support of this conclusion to discuss the many authorities

referred to in the briefs and considered by me on granting the order allowing the substitution; it will be sufficient, I think, to refer to some later cases not cited by counsel which have fallen under my observation, and which to my **[52]** mind very fully cover every phase of the question.

In the case of McDonald vs. State of Nebraska, 101 Fed. 171, the same question arose, under circumstances very similar, in legal effect, to those presented here. The action was originally commenced in the name of the State Treasurer against the receiver of an insolvent national bank, to recover certain moneys belonging to the State on deposit in the bank. A demurrer was interposed upon the ground that the Treasurer had no legal capacity to sue, and that from the averments of the petition it appeared that the State was the sole party in interest. The demurrer was sustained, but by leave of the Court the State of Nebraska was substituted as the sole plaintiff in place of the Treasurer. As so amended the petition was demurred to and the Court was asked to strike it from the files. This relief was denied, and judgment going for the plaintiff, the defendant appealed, urging "that the substitution of the State of Nebraska as plaintiff in the action was a change of the cause of action, and that as the statute of limitations had run against the plaintiff's claim before the substitution was made the cause of action was barred"; in effect the same objection made here. In deciding the case and overruling this objection, Judge Caldwell for the Court of Appeals first reviews the

cases on the subject from the Supreme Court of Nebraska, and reaches the conclusion that under the statute of that State, which will be found no broader or more liberal in terms than that of California, the allowance of the amendment was not only within the power of the Court, but that it would have been error to have refused it. "But," proceeds that learned Judge, "independent of the Nebraska Code and the decisions of the Supreme Court of that State, we would have no difficulty in upholding the judgment of the lower **[53]** Court in this case both upon principle and authority. The right and duty of the federal courts to allow amendments does not rest on State statutes only. It is conferred on them by the judiciary act of 1789. * * * The thirty-second section of that act was designed to free the administration of justice in the federal courts from all subtle, artificial, and technical rules and modes of proceeding in any way calculated to hinder and delay the determination of causes in those courts upon their very merits. This act emancipated the judicial department of the Government from the shackles of artificial and technical rules, which had theretofore been interposed to obstruct the administration of justice, as completely as the Revolution had emancipated the political department of the Government from foreign domination. This was done by investing the federal courts with plenary power to remove by amendment all such impediments to the attainment of justice. From the first, the Supreme Court of the United States grasped the object and purpose of this enactment. In re-

ferring to this section of the judiciary act, the Supreme Court of the United States, speaking by Mr. Justice Story, said:

> " 'The authority to allow such amendments is very broadly given to the courts of the United States by the thirty-second section of the judiciary act of 1789, c. 20 (now section 954, Rev. St. U. S.), and quite as broadly, to say the least, as it is possessed by any other courts in England or America, and it is upheld upon principles of the soundest protective policy.'—Matheson's Adm'rs v. Grant's Adm'r, 2 How. 263, 281.

"And Mr. Justice Miller, speaking from the circuit bench, declared:

> " 'This section makes more liberal provision for the amendment of process, pleadings, and all proceedings in the federal courts, than any of the [54] modern codes. It is founded on common sense and justice, and ought to be regarded by the Circuit Courts as mandatory.'

"Under section 954 of the Revised Statutes the right of amendment extends to the 'summons, writ, declaration, return, judgment, and other proceedings in civil causes in any court of the United States,' and may be exercised at any stage of the case, even after trial and judgment. The extended and beneficent use made of the authority given by the section to make amendments is disclosed by a long line of decisions of the Supreme Court of the United States covering every step in a case from the summons to the verdict and judgment."

And after citing numerous cases from the Supreme Court and other federal courts in support of the principles thus stated, it is said: "A defendant has an undoubted right to insist that the person entitled to recover on a cause of action set forth in a petition shall be brought on the record as the plaintiff in the action, to the end that he shall not be compelled to respond twice to the same demand; and that the one suit shall bar all others for the same cause of action. But it has come to be the settled law that where, either by mistake of law or fact, a suit is brought in the name of a wrong party, the real party in interest, entitled to sue upon the cause of action declared on, may be substituted as plaintiff, and the defendant derives no benefit whatever from such mistake; but the substitution of the name of the proper plaintiff has relation to the commencement of the suit, and the same legal effect as if the suit had been originally commenced in the name of the proper plaintiff. The name of the proper plaintiff may be brought on the record at any time during the progress of the cause, and may even be inserted after verdict and judgment. When [55] a wrong party has been named as plaintiff, the action will never be dismissed, and the proper plaintiff required to bring a new action, when the effect would be to let in the bar of the statute of limitations."

Judge Caldwell then proceeds to review all the leading authorities upon the subject from other State courts, and shows that they are fully in harmony with the conclusion reached by him.

This case is followed by two others from the same

court: Franklin vs. Conrad-Stanford Co., 137 Fed. 737, and Leahy vs. Haworth, 141 Fed. 850.

In the first case the Court allowed a substitution of parties plaintiff, to which defendant objected so far as it affected a second count in the complaint, on the ground that the latter set up by way of amendment a new cause of action not pleaded in the original complaint, and that as to it the action must be deemed commenced when the amended complaint was filed; that the transfer to the substituted plaintiff was not during the pendency of the suit on the demand originally sued on, and to permit the substitution would be to give vitality to a suit which otherwise must have failed as instituted by one having no interest therein. In disposing of the objection that this could not be permitted under the Utah Code, it was said by the learned Judge of the court below:

> "The provisions of the Utah Code with respect to amendments are extremely liberal. They are identical with the provisions of the codes of other states, which have been held to permit the substitution of the proper plaintiff where suit has been instituted by one not entitled to sue, and the defense has been interposed that some one else should have sued. The authorities on this question are collated in McDonald vs. Nebraska, 101 Fed. 171, **[56]** 41 C. C. A. 278. But it must be admitted that the Supreme Court of Utah has construed the Utah statute otherwise (Skews vs. Dunn, 3 Utah, 186, 2 Pac. 64; Wilson vs. Kiesel, 9 Utah, 397, 35 Pac. 488),

in that following the Supreme Court of California in the case of Dubbers vs. Goux, 51 Cal. 153.

"If the right to allow the substitution depended upon the provisions of the Utah Code, the Court would be embarrassed by these decisions of the Supreme Court of Utah construing that Code. But, as pointed out in McDonald vs. Nebraska, supra: 'The right and duty of the federal courts to allow amendments does not rest on state statutes only; it is conferred on them by the judiciary act of 1789,'—now section 954, Rev. St. U. S."

Judge Marshall then proceeds to quote from McDonald vs. Nebraska a portion of the language heretofore quoted therefrom, and in accordance with the principles announced in that case overruled the objection; and this ruling is affirmed by the Circuit Court of Appeals.

In the next case the bill was filed in the Circuit Court for the District of Nebraska to foreclose a mortgage held by the estate of a subject of Great Britain upon property in Nebraska. The bill was originally filed by the English executors, suing in their individual capacity under their common-law right as owners of the chattel; one of the complainants died and the bill was amended to continue the action in the name of the survivor, but still in his individual capacity; at the trial his right to maintain the action in that form being questioned, it was held that he must sue in his representative capacity, and leave was given to amend; he thereupon filed an

amended bill in his capacity of executor under his appointment by the English court, and by a later amendment set up that he had since procured letters testamentary on the estate of his testator in the probate court of Nebraska. This last proceeding was had, however, after the expiration of the statute of limitations, and the objection was made in the Court of [57] Appeals that the Circuit Court had erred in holding that the proceedings in the probate court of Nebraska, which were not commenced until more than ten years after the maturity of the debt and after the filing of the amended bill, might relate back to the date of the filing of the last amended bill, not only for the purpose of qualifying the plaintiff to sue, but also for the purpose of bringing the suit within the period of the statute of limitations. That objection was overruled, the Court holding that the action of the lower court was proper; that the amendment effected no substantive change in the legal aspects of the cause of action, which remained the same as in the beginning; that complainant having an inchoate right to enforce the obligation, the change of the pleading by setting up his legal qualification, notwithstanding such qualification did not exist at the date of the commencement of the action, was merely modal and formal and would relate back to the filing of the bill, notwithstanding the statute had run against the bringing of a new suit (citing McDonald vs. Nebraska, *supra*, and other cases). See, also, Chicago G. W. Ry. Co. vs. Methodist Church, 102 Fed. 85, where it is held that the fact that an action was brought in the name of

the wrong party as plaintiff was not ground for reversal, but that the appellate court would itself direct the substitution of the proper party.

The principles announced in these cases are clearly applicable to the circumstances presented here. As we have seen, no change has been worked in the form or substance of the cause of action set up; that remains in all respects the same. The father is now, as he was when the original complaint was filed, the real party in interest for whose benefit, under the express language of the statute, the action may be maintained. He has then a [58] right to have the action prosecuted; but the law says that that must be done through the instrumentality of the legal representative rather than that of the immediate beneficiary; and this purely formal requirement is all that is accomplished by the amendment allowed. Had the father procured himself, instead of the present plaintiff, to be appointed the administrator of his dead son's estate, as was his legal right, there could be no question, under the foregoing authorities, of his right to have himself in his representative capacity substituted as plaintiff in place of himself as an individual; and the chances are, if such had been the course pursued, the present objection would never have suggested itself. Can it make any difference in the application of the principle, or any more effect a substantial change in the legal status of the case, that he has seen fit to have another serve in that capacity? The representative is a mere formal instrumentality required by the statute to effectuate the purpose; it in no sense partakes of the

substance of the right who is made the legal representative to enforce it. The appointment of a stranger to that office no more makes the action in his name a new action in any material sense, than if the father had been appointed.

It is claimed that the statute of the State, as limited by the construction put upon it by the Supreme Court of the State, does not warrant the action of the Court; and Dubbers vs. Goux, 51 Cal. 153, referred to in the Utah case, is relied upon. The circumstances of that case were different from those of the present, and I am not satisfied that it sustains defendant's view; as to which see the later case of Merced Bank vs. Price, 9 Cal. App. 189. But, as we have seen, the inquiry is not very material **[59]** if, as I think I have shown, the action of the Court is warranted by the federal statute upon the subject. The statutes of the State may sometimes enlarge, but they can never restrict the powers of these courts. Manitowoc Malting Co. vs. Fuechtwanger, 169 Fed. 983, 987.

The demurrer will be overruled and the motion to strike the amended complaint from the files will be denied.

[Endorsed]: Filed January 2d, 1912. Jas. P. Brown, Clerk. By W. B. Maling, Deputy Clerk. **[60]**

In the District Court of the United States for the Northern District of California, Second Division.

No. 15,144.

J. E. REARDON, Administrator of the Estate of FRANK WHITSETT, Deceased,

Plaintiff,

vs.

BALAKLALA CONSOLIDATED COPPER COMPANY, a Corporation, et al.,

Defendants.

Bill of Exceptions.

BE IT REMEMBERED that the above-entitled cause came on regularly for trial on Wednesday, the 15th day of May, 1913, before Honorable William C. Van Fleet, Judge of the above-entitled court, sitting with a jury, the plaintiff in this action appearing by his attorneys, William M. Cannon, Esq., and C. S. Jackson, Esq., and the defendant appearing by C. H. Wilson, Esq., its attorney.

A jury was thereupon impaneled and sworn to try the case and the following proceedings were had and testimony taken:

[Proceedings Had on May 15, 1912, While Jury was Being Impaneled, etc.]

That on May 15th, 1912, and while said jury was being impaneled, and in the presence of the other jurors, during the examination of N. S. Arnold, a talesman, on his *voir dire*, by William M. Cannon, Esq., attorney for plaintiff, who subsequently sat as

a juror in this cause, the following proceedings were had: **[61]**

N. S. ARNOLD (on his examination as to his qualification as a juror):

Q. Have you any connection either as a stockholder or otherwise with an indemnity company, or organization for the purpose of insuring people against personal injuries?

Mr. WILSON.—I object to that question as immaterial.

Mr. CANNON.— I do not think it is immaterial. I would like to state why I asked the question.

The COURT.—What is the reason?

Mr. CANNON.—The reason is—

Mr. WILSON.—I object to the reason being stated.

The COURT.—I am asking for it.

Mr. CANNON.—In this case there is certain indemnity insurance against this kind of accident, and the insurance company is defending, through its own counsel, this action; therefore, I have a right to inquire—

Mr. WILSON.—I object to the statement made by counsel and assign it as error. It is an improper statement to make in this case.

The COURT.—I will develop what the fact is; I will instruct the jury that they pay no attention to anything of that kind. I am bound to know the theory on which the question is asked, when it is objected to, especially. That is why I asked the reason.

Mr. WILSON.—We insist on the error.

The COURT.—You have your right to reserve your

exception. I overrule your objection.

Which ruling defendant now assigns as

ERROR NO. 1. **[62]**

[Motion That Jury be Discharged, etc.]

Mr. WILSON.—We now move that the jury be discharged on the ground that improper and foreign matter has come to the knowledge of the jury.

The COURT.—The motion will be denied. I will instruct the jury to pay no attention to the remark of counsel, unless it should appear it is a pertinent fact.

Which ruling defendant now assigns as

ERROR NO. 2.

Mr. CANNON.—Q. Have you any connection, either as a stockholder, or otherwise, with any indemnity company such as I have described?

Mr. WILSON.—We insist upon our objection.

The COURT.—I overrule the objection.

Mr. WILSON.—I will take an exception.

The COURT.—They have a right to inquire into facts of that kind. It might affect a juror's fairness, and it might turn out that some of them were stockholders in some such company.

Mr. WILSON.—The Supreme Court of this State has decided otherwise.

The COURT.—The objection is overruled.

Which ruling defendant now assigns as

ERROR NO. 3.

That the jury, being impaneled and sworn to try the case, the following proceedings were had, and testimony taken:

[Motion that Plaintiff Elect Between Two Causes of Action, etc.]

Mr. WILSON.—If your Honor please, before the opening statement in this case is made, I desire to make a motion that the plaintiff at this time now elect between the two causes of action set forth in the complaint. The complaint, in the fourth paragraph, reads as follows: **[63]**

> "That the defendant failed and neglected to exercise ordinary care in providing and maintaining a safe, suitable and proper place for plaintiff to perform his said labor aforesaid; and failed and neglected to provide a careful and competent man, and had in their employ at that time a man known to the defendant to be unreliable and careless, whose express duty it was to locate, mark and report to the on-coming shift unexploded charges of powder."

Your Honor will observe that those two causes of action are stated in one count in the complaint; that the failure to furnish a safe place in which to work, and the failure to furnish a competent coemployee, each is a separate cause of action; the violation of each one or either of those duties would give to the plaintiff a cause of action and they each are separate delicts.

The COURT.—The motion will be denied. I will not permit it to go in as a double cause of action, Mr. Wilson; I understand the theory of the complaint,

and I shall instruct the jury that they can have but one recovery.

Which ruling defendant now assigns as

ERROR NO. 4.

[Motion That Plaintiff be Restricted in His Proof to Particular Cause of Action, etc.]

Mr. WILSON.—We make the further motion, if your Honor please, that in this case the plaintiff be restricted in his proof to the particular cause of action stated in this complaint, to wit, that the injury here complained of was proximately caused by the negligence of the defendant in failing to provide a careful and competent man known as a missed-hole man or a missed-shot man.

The COURT.—I will deny your motion formally at this time, but I will restrict the evidence within the lines that are deemed to be competent and proper when it comes to it. **[64]**

Mr. WILSON.—With your Honor's permission we will take our exceptions.

Which ruling defendant now assigns as

ERROR NO. 5.

[Testimony of Lawrence Whitsett, for Plaintiff.]

To support the issues on his part to be maintained, the plaintiff thereupon called as a witness LAWRENCE WHITSETT, who, on being duly sworn, testified as follows:

I reside in Glendale, Oregon, and am a brother of Fred Whitsett, and Frank Whitsett, now deceased. My father, James Whitsett, and my mother, Susie Whitsett, are now living in Glendale. My brother,

(Testimony of Lawrence Whitsett.)

Ed Whitsett, is living. On March 9, 1909, at the time of the happening of the accident and injury complained of, I was working in the mine close to the place of the accident between what is called 3 and 4. I had worked in the mine a little over 3 months. 3 is a drift running towards 4. While there I worked only in 3 and 1. 3 and 4 at the time of the accident had come together, thus forming one continuous tunnel. Mr. Bishop was superintendent and Mr. Grenager was day foreman and did day work. B. Hall was night foreman. Myers was night shift boss. Myers and B. Hall took night shifts. I know Nat Yokum. To my knowledge Nat Yokum worked in the mine 3 months before the accident and was a missed-hole man. A missed shot is a shot that does not go off with a round of holes. A round of holes are those drilled before a shot in the top, center and bottom of a face and are about 10 in number drilled from 4 to 5 feet in depth and are driven ahead in the face. The top holes drive straight in, and the rest of the holes point straight down, giving them a chance to **[65]** break the rock out. The night foreman, B. Hall, directed the driving of holes. The holes were driven with a Burleigh drill machine worked by 2 men each, a machine-man and a chuck-tender. The machine-man would crank and point the drill and the chuck-tender would put water in the hole and change the drill. In the course of their work they would sometimes change places. It was the duty of Yokum to find and fire missed holes. I have worked in mines about ten

(Testimony of Lawrence Whitsett.)
years. During the three months prior to the accident that I worked for defendant I was night machinery repairer for about a month. After that I was a machine-man, running a drill. Where there remains an unexploded blast or what is called a missed hole, it is dangerous to drill another hole in the vicinity, or to drive into it. The danger is that an explosion most generally happens. On the evening of the accident I went to work about eight o'clock and in about two and a half hours the accident took place. I was about sixty feet away from where my brothers were working, back towards the mouth of the main tunnel. I could see the point where they were working. When I was up there earlier in the evening, I saw that the Burleigh drill was set for a lifter, that is, for boring a hole in a drift to take up the bottom and make it level. At that time my brothers were working. At the time of the accident I was back at the point of my own work. I heard a loud explosion. I went up there. I found Frank dead and Fred hurt pretty bad. I did nothing. I went on out of the mine and I did not see Fred until after they brought him out. I saw him at the mouth of the tunnel. At that time he was conscious a little while and then he was unconscious. He did not say anything to me. He was then taken to the hospital in a wagon. I went to the hospital the next day. I saw the wagon in which he was taken **[66]** but I do not know whether it was a dead-wagon or a spring-wagon. There was a cot in the wagon and he was on the cot.

(Testimony of Lawrence Whitsett.)

When I first saw my brother after he was taken out of the mine he was bleeding and black with smoke and dirt and his clothing was all torn up. The next day when I saw him at the hospital he was conscious. He remained there at the hospital about 4 months. I visited him frequently. For the first three weeks I remained there. I then went away and came back in a month or so and remained with him for about ten days. During the three weeks that I remained at the hospital he was at times conscious; at other times he was not. He appeared to be suffering pain and very frequently made outcries and moans. His arm and leg were bandaged up so that I could not see the extent of his injuries. Afterwards I saw my brother at Glendale when he got home. He was there in the train and was brought to the house in a rig and carried in. He was in bed for the three months that I remained there. He had the doctor and his mother looked after him. I then went away and came back at the end of about three months. He was then getting around on crutches a little. Before the accident my brother was strong and rugged. He was about 22 years of age and weighed about 160 pounds. He is not at all like that now.

Q. State what the manner and appearance of your brother at the present time is physically and mentally, as compared with his condition at and before the time of this accident.

Mr. WILSON.—I object to that upon the ground that it is incompetent, irrelevant and immaterial

(Testimony of Lawrence Whitsett.)

and calling for the opinion of the witness and no proper foundation laid.

The COURT.—The objection is overruled.

Mr. WILSON.—I take an exception. **[67]**

To which ruling the defendant then and there excepted and now assigns the same as

ERROR NO. 9.

Mr. CANNON.—Go on and state fully.

A. He does not seem to have the mind *had* had before the accident.

Mr. WILSON.—Let me move to strike out the answer as not responsive, and incompetent, no proper foundation laid for it.

The COURT.—I will overrule your motion.

To which ruling the defendant then and there excepted and now assigns the same as

ERROR NO. 9a.

Since the accident my brother has worked around the home quite a lot, mostly helping my mother in the kitchen, but he has done no heavy labor of any kind. He does not seem to have much strength. I have observed a change in his condition.

Q. What change have you observed?

A. He does not seem to me to be the man he was physically or mentally.

Q. Can you describe it any more particularly than that? A. No, sir.

Prior to the accident I was acquainted with Mr. Hall, the night foreman.

Prior to the accident I discovered at several dif-

(Testimony of Lawrence Whitsett.)

ferent times missed shots in the place where I was working, and reported them to Mr. Hall. I should judge that I discovered four or five missed holes and reported them. Mr. Hall was my immediate superior. My work did not bring me in connection officially with the missed-hole man. I have seen the missed-hole man Yokum **[68]** under the influence of liquor and several times have seen him drunk while on duty. Yokum drank considerable. He was absent from work several times and when he returned he would be intoxicated. I told Mr. Hall that I had found missed holes at several different times around difference places where he had told me to set up. I did not say much to him about Yokum, nor did I mention to him anything about the condition that I had seen Yokum in at different times. During the night while Hall was on duty, he would be going around among the men seeing if they were working and telling them where to work. Yokum would be looking after missed holes and pulling down rock. They both covered the same territory. Our work was not at the same place every night. At the time of the accident my brother was receiving $2.75 a day and working every day in the month. He paid his expenses out of that, 75¢ a day for board and $1.50 a month for bunkhouse room; hospital fees $1.00 per month, which included the privilege of 10 weeks in the hospital at Coram. Two shifts worked 8 hours each in the 24 hours. The night shift worked from 8 o'clock in the evening until 5 o'clock in the morning, with an hour off for

(Testimony of Lawrence Whitsett.)

lunch. When the shifts went off the blasts that were ready would be exploded and then the missed-hole man would make his examination and the miners would not commence drilling again until after his inspection. At the point of the accident they were starting to run a cross-cut from 3 to 4. (Witness is shown photograph.) That is a photograph of a machine and the point where they started to cross-cut and also of the place where the accident occurred. The photograph was taken the night before the accident. I recognized in the photograph Frank Whitsett, who is marked with the letter A, Fred Whitsett, who is marked with the letter B, B Hall, who is marked with the letter D and Enos Wall, who is marked with the letter E, and the Burleigh drill, being marked C. Between **[69]** the time when this photograph was taken and the time the accident occurred. I do not know that any work had been done at that place other than drilling the previous round of holes. The machine there is what is known as the Burleigh drill. It is run by air.

Mr. WILSON.—We will admit, if your Honor please, that this is photograph of the drift or cross-cut, whichever it may be, where the accident occurred, taken the night preceding the accident, and that it may be used for the purpose of illustration as a diagram, with such modification of conditions as may be shown, to have taken place after the taking of the photograph, as may be shown by the evidence.

(Testimony of Lawrence Whitsett.)

The work at the place of the accident was carried on by candle light. (The witness' attention is called to a diagram drawn on the blackboard.) The space between the two main lines up and down represents the tunnel, which has been called 3 and 4. The cross represents the place where the work was being done at the time of the accident. Below and to the left are two cross lines, the space between which is supposed to represent a cross-cut. It was at this point that I was working at the time of the accident and at that time Enos Wall was working at the place marked B. At those times when I called the attention of Mr. Hall to the missed holes, of which I have testified, he did not ask me to do anything with reference to them, but gave me another place to work. At the time of the accident and for about 10 years prior thereto my father had been in poor health, and he is in poor health at this time and unable to work. My mother is also very poorly.

Q. What was the condition of your father and mother with reference to their financial condition and their health and ability to earn money generally? **[70]**

Mr. WILSON.—I object to the question as irrelevant, incompetent and immaterial, not the proper proof of damages in the case, and calling for the conclusion of the witness.

Mr. CANNON.—I will modify the question. What was the financial condition of your parents at

(Testimony of Lawrence Whitsett.)

the time of the death of one brother and the injury to the other?

Mr WILSON.—The same objection.

The COURT.—Objection overruled.

To which ruling the defendant then and there excepted, and now assigns the same as

ERROR NO. 14.

A. They were very poor. My brother Frank had contributed to their support since he was big enough to work for wages. At the time of the accident he had been working underground as a miner for three years, and Fred for three months.

Cross-examination.

My mother and father live in the town of Glendale in a small house built on a lot owned by my brother. My father does not own any real property, nor does he have a bank account. He is 56 years old and my mother about 53. My brother Ed Whitsett is the oldest; he works as bridge carpenter and contributes to the support of my father and mother. Next comes Milton. He works in a block-signal gang on the railroad. Then I come. I was born in 1883 and have been mining for ten years and contribute to the support of my father and mother and always have done so since I have worked. After me there came Fred and Frank, twins. There is one living sister and one deceased. I worked in the defendant's mine three months prior to the accident, but [71] did not work afterwards. Frank and I began work there at the same time. Before that he had worked in Siskiyou County off and on for

(Testimony of Lawrence Whitsett.)

three or four years. In mining a drift runs along the course of the vein, and a cross-cut runs through or across the vein. The cross-cut at the place where the accident occurred had not progressed at all at the time of the accident; I mean that they had not taken out any rock there. I was at that place about an hour before the accident and Fred and Frank were there. I then went to work at the place marked 4, which is about 60 feet away. I was operating a drill at the time. I was slabbing off, that is, knocking down ore off the side of the drift. I stood in the drift most of the time but I was slabbing off the cross-cut. Enos Wall was working at the place 3. During the time that I worked on this shift I did not go to the place 2 on more than one occasion. I began work at the place 4 and worked there approximately an hour and a half and then went to the place 2 and was there probably 5 minutes. While I was there my two brothers Fred and Frank were there. I do not remember anyone else being there. I then returned to the place 4 and continued work up to the time of the explosion. After I returned to the place 4 neither of my brothers came to me, nor did I have any communication with Enos Wall. The distance between 3 and 4 is about 30 feet and 3 is about halfway between 4 and 2. The night of the accident was my first shift in this drift. While I had probably passed the point 2 before the accident, I had never had occasion to stop there until the time that I have testified to, when I was there about 5 minutes, an hour or so before the

(Testimony of Lawrence Whitsett.)

accident. When I was at the place 2 before the accident there were probably 8 or 9 top holes already drilled. It was the practice to drill about a dozen holes in [72] the face of the drift or cross-cut and then load them with powder, the number of holes depending somewhat on the size of the face or nature of the ground. The blast is exploded as the men go off the shift. The men work shifts of 8 hours with intervals of 3. In the intervals the powder smoke, caused by the explosions, would clear away. The explosion would cause the dirt and rock to fall down in large quantities. I have known Yokum about 5 years. Several times while I worked there I saw Yokum drunk at the entrance into the mine. The last time was about two weeks before the accident. He was then staggering around. I never noticed Yokum intoxicated when any of the superiors were around. There were probably about 100 men that went into the mine on each shift. The drill-men would work at 25 or 30 different faces in the mine on each shift. Some of these faces were a considerable distance away from others. Yokum was the only missed-hole man at the mine, so far as I know. While I worked there I saw Yokum go on shift intoxicated probably 4 or 5 times. He got his liquor at a little place about a mile away. My father has been ill with Bright's Disease about 10 years. My mother has been ill about 8 years. I do not know what is the matter with her. I do not know how much money my brother Ed contributed to the support of

(Testimony of Lawrence Whitsett.)

my father and mother. I contributed $15.00 or $20.00 a month.

Redirect Examination.

When the men gathered at the entrance of the mine preparatory to going on shift, the foreman was at the candle-house where all the men went to get candles. B. Hall directed the miners where to work. I was never told, while working in that mine, to examine for missed holes. A night bookkeeper there checked off the men as he gave out the candles. **[73]**

Recross-examination.

We went by numbers. We had checks. We got our tag and presented that as we went on shift. We got the tags from a board alongside the candle-house and handed them to the bookkeeper, who was inside, and he gave out the candles.

[Testimony of Enos A. Wall, for Plaintiff.]

ENOS A. WALL, called as a witness on behalf of the plaintiff, on being duly sworn, testified as follows:

I reside at Medford, Oregon. At the time of the accident I was running a drill in defendant's mine. I knew the Whitsett brothers, also B. Hall and Yokum. I knew Mr. Grenegar, foreman, and Mr. Bishop, superintendent, of the mine. At the time of the accident I was working within 30 feet of Fred and Frank Whitsett, at the place marked on the diagram 3. They were working at 2; Lawrence Whitsett at 4. The machine at which Fred and Frank were working had been set up the night before.

(Testimony of Enos A. Wall.)

They were just starting a cross-cut. B. Hall assisted in setting up the machine. The photograph shows the point at which the cross-cut was commenced. The photograph is a flashlight taken the night before the accident. They drilled, I think, 5 holes the night before the accident. None of those were shot off that night, but the work of drilling was continued by the next shift. I saw the Whitsett boys working at 2 on the night of the accident. The only lights they had were candles. Between the time I went on shift and the happening of the accident, I went to get a drink, and coming back stopped to talk with the Whitsett boys. B. Hall was not there at that time. He was there at about half past eight and remained probably five minutes. I was running my machine when the explosion occurred. It put out the lights for one hundred feet around. I lit my candle as soon as I [74] got over there. I found Fred about 8 feet from my machine. That would be about 22 feet from where they were working. I did not find Frank, but I assisted in taking Fred out of the mine. I took him by the arm and helped him up until another fellow came and assisted me. We went out from No. 4 through No. 3 and used the skip at No. 3 and so down to the main tunnel and out of the mine. He was partially unconscious until we got him outside and kept saying, "You hurt my arm." When we got outside he kind of went away in a stupor. I put him on a cot in the bunkhouse, washed his face the best we could and bandaged it and got a wagon to

(Testimony of Enos A. Wall.)

take him to the hospital, which was about 5 miles away.

Q. What kind of a wagon did you take him in to the hospital?

Mr. WILSON.—I object to that as immaterial, no part of the *res gestae*, no element of damage in this case, and incompetent.

The COURT.—I overrule the objection.

To which ruling the defendant then and there excepted and now assigns the same as

ERROR NO. 18.

A. It was a dead *X* wagon. I did not go with him to the hospital but walked down with his brother. I saw him the next morning. His head was bandaged all over. I stayed in town 7 days and saw him every day at the hospital. The first three days he hardly knew us. After that he seemed to gain consciousness a little, gained right along. After the seven days I went down every Saturday to see him until he commenced to get better. Then I would go once in two weeks. The last time I saw him was the 4th of July. [75] He was in bed then and they had removed the bandages from his head. I did not see him again for four months when I saw him in Medford. He then walked with a cane and was lame in one leg. At the times I called on him at the hospital he would moan once in a while and holler when he moved. I know Yokum. He was a missed-hole man. Before the accident Yokum quite often got under the influence of liquor. About ten days or two weeks prior to the accident I was look-

(Testimony of Enos A. Wall.)

ing for steel and I ran on him one evening when he was lying on a pile of muck asleep. Prior to the accident I probably saw him under the influence of liquor once a week.

Q. At any time that you saw him under the influence of liquor, where was the foreman, if you know?

A. He never stayed close to the foreman; he managed to be in another part of the mine all the time.

When the men were going into the mine at the beginning of a shift they would get their candles at the office from the bookkeeper. At such times the foreman would be there. Yokum would get his candles at the same time as the other men. I should judge that there were about 180 or 200 men on each shift. After a round of shots had been fired the drifts were cleaned out entirely and then subject to inspection by the missed-hole man. That would be done before a shift would go to work at that same place again. We had a clean place for the machine.

Cross-examination.

My work was at place 3, which was 30 feet away from the place 2 where the accident happened. The photograph was taken March 8th, the night before the accident. These men represented in the photograph, except Hall and myself, worked at that place **[76]** on the evening of March 8th. The machine was in the position indicated in the photograph when I went to the place 2 on the evening the photograph was taken. I did not see the day-shift working at 2 on the day preceding the accident, but from

(Testimony of Enos A. Wall.)

the holes that were there one would naturally think that work had been done there. There were about five more holes than there were when the Whitsett boys quit the morning before the accident. They usually drill 12 holes in the face of a cross-cut of that character before they load the dynamite. I saw Yokum under the influence of liquor about a week before the accident. He was lying on a muck pile in the mine. I guess it was about a week before that I also saw him under the influence of liquor at the bunkhouse. I saw him on several different occasions, but I did not keep a memorandum of the times.

Mr. CANNON.—Mr. Wilson, it is not disputed that Frank Whitsett was killed in this accident, is it? I have not shown his death absolutely.

Mr. WILSON.—No, that is not disputed. It is admitted.

The COURT.—I want to ask you one question. You spoke of an occasion when you saw Yokum sleeping on a muck pile; was or was not that during the working hours of his shift?

A. It was during working hours.

[Testimony of Ed Whitsett, for Plaintiff.]

ED WHITSETT, called as a witness on behalf of the plaintiff, on being duly sworn, testified as follows:

I am a brother of Fred and Frank Whitsett. At the time of the accident I was at Glendale and did not see my brother Fred until about June 20th. I then saw him at the hospital **[77]** in Coram. He

(Testimony of Ed Whitsett.)

was in bed. Afterwards he sat out on the porch with a nurse. He remained there until about the 8th of July. I remained at Coram until he left and was at the hospital every day and saw him wash his leg every day. They kept the leg open and washed it out every day and they scraped the bone right up and down to get off the broken bone. My brother suffered pain during all that time and on one occasion they put him under the influence of an anaesthetic. The bone was scraped for a distance of between 7 and 8 inches. About July 8th I took my brother home to Glendale where he was put to bed and had the attendance of a physician. I remained there about a week and then went to work. During the time that I was there he appeared to be suffering pain all the time. I went back home as often as I could, sometimes once a week and sometimes once a month. After about a couple of months my brother could get about with a pair of crutches, but it was close to a year before he could get about without either crutch. He then used a cane, but I do not know how long he used the cane. Before the accident he was strong and stout and weighed about 160 pounds. He now weighs about 130.

Q. What is the appearance of your brother Fred now as compared with his appearance before the accident.

A. Nothing at all; no comparison, whatever.

The COURT.—Q. How do you mean—do you mean that he appears so much better now, or worse?

A. Worse.

(Testimony of Ed Whitsett.)

Mr. CANNON. — Q. What appears to be his mental condition now with respect to memory and his mentality generally as compared with what he was before the accident? [78]

Mr. WILSON.—I object to that upon the ground that it is incompetent under the pleadings, irrelevant, and that there is nothing of that character alleged in the pleadings.

The COURT.—The objection is overruled.

To which ruling the defendant then and there excepted and now assigns the same as

ERROR NO. 20.

A. Nothing at all. The mind isn't like it was before at all. My brother kept books for a man in Roseberg last summer and he is now working on the ranch raising chickens and a little garden. So far as I know, he has done no heavy work since the accident. Prior to his death my brother Frank contributed to the support of his father and mother.

Cross-examination.

I could not state exactly the date or time when I saw my brother Frank give any money to my father or to my mother. I have seen him the same as I have seen myself and all the rest of us pay the bills. When we got home we four boys went together and paid the grocery bills, the medicine and doctor bills and everything.

Q. Your mother has been ill for a long time, has she? A. She has for about eight years.

Q. What is the trouble with her?

A. Well, change of life for one thing.

(Testimony of Ed Whitsett.)

Q. And what else?

A. Other ailments; I could not say what. That has been the principal thing, so the doctor told me.

Q. You don't know except what the doctor told you? [79]

A. That is all I know about it.

Mr. WILSON.—I move to strike it out as hearsay.

The COURT—Let it stand.

To which ruling the defendant then and there excepted and now assigns the same as

ERROR NO. 21.

My mother is about 54 years of age and my father about 56. My age is 33. I have contributed about $20.00 a month to the support of my father and mother.

[Testimony of Fred Whitsett, for Plaintiff.]

FRED WHITSETT, being called as a witness on behalf of the plaintiff, on being duly sworn, testified as follows:

I am the plaintiff and a brother of Frank Whitsett, who was killed in an accident I went to work for the defendant January 27th, 1909, and worked continuously up to the time of the accident. I was a machine-man's helper, working on the night shift. The boss of that shift was B. Hall. The foreman of the day shift was Grenegar. On the night before the accident a photograph was taken at the place where the accident happened. Before the photograph was taken I had not done any work at that particular point. The drift at that time had not been started. My brother Frank and B. Hall and

(Testimony of Fred Whitsett.)

myself set up the machine, as shown in the photograph, and it was in that place at the time of the explosion. Prior to the machine being set up and prior to the taking of the photograph I do not know whether any recent drilling had been done at that point. After the photograph was taken my brother and I went on drilling until half-past four in the morning, and I think we drilled five holes. We went to work again at that place on our next shift, which was at eight o'clock the following night. **[80]** B. Hall was there at the time and told us to go ahead and finish that round of holes and shoot the round when we went off in the morning. At that time there were two holes and part of another to drill, to finish the round. The drill was in the partly drilled hole and B. Hall told us to go ahead and finish that hole and we drilled in, I guess, 15 or 20 minutes and it exploded. At that time my brother was tending chuck and I was running the machine. I heard the report; that is about all I know. The next thing I remember was when the doctor came from Coram. I was in bed some place. I was conscious probably one-quarter of the trip from the mine to the hospital. After I reached the hospital I should say I was conscious about half of the time for the first six or seven weeks. During that time I do not know what the treatment was. After that time I noticed that my arm was stiff, my left leg was bent back and I could not straighten it for about two months and a half. I found this place here was fractured and right along here also (pointing) and there

(Testimony of Fred Whitsett.)
are scars all over my head. My hearing is not as good as before the accident. My arm was broken, but it is all right now. It was three or four months before I had any use of it and since the injury it has not been as strong as the left arm. Pieces of rock were shot into my head and the doctor had to get them out. They caused the scars. When I left the hospital I could not hardly do anything to help myself, nothing at all. I had to have somebody dress me and move me in the bed and out and pack my meals to me. After I went home it was seven or eight months before I was able to be out. It was in December before I got out on the porch by myself. I suffered a whole lot of pain while I was in the hospital and after I left the hospital. I always suffered when they dressed my leg. There is a large scar there now about 7 inches long. Pieces of rock were taken out of that wound and the bone was [81] affected, small pieces of bone came out of the wound for nearly two years after the accident. I cannot sleep very well nights at present. I have to sleep almost sitting up, because if I lie down in bed my head gets dizzy. I should judge that my left leg is now about half as strong as my right leg. If I walk too far it gives out on me. Once or twice since the accident I have attempted to do manual labor, but I could not make it. At the time of the accident I was receiving $2.75 a day. My brother Frank was getting $3.25. There is a large scar in my right arm just above the elbow where the break occurred. (Here the witness bared his body to the jury that

(Testimony of Fred Whitsett.)

they might see his various marks and scars.)

My brother Frank and I were twins. We were 22 years of age at the time of the accident. While I was in the hospital there were seven operations performed on me. There was one operation that occupied from 8 in the morning until 6 o'clock in the evening, removing the bones from my leg. During that time I was under an anaesthetic. The next longest operation was 3½ hours. My expenses at the hospital at Coram were $248. The doctor's bill at home, I guess, was three or four hundred dollars. I paid $1.00 a week, which was deducted from my wages and entitled me to receive ten weeks at the hospital at Coram.

Cross-examination.

The debt to the hospital of $248.00 was incurred after the expiration of 10 weeks. I have never seen the bill of the doctor at Glendale. He did send one bill, which was about $300. I worked for the defendant six weeks prior to the accident with my brother Frank operating the drill and tending chuck. **[82]** The first work that we did at the place of the accident was on the evening the photograph was taken. I think we drilled five holes that night. After we came off shift the day shift went on and they continued the drilling, so that when we went on shift the night of the accident there were two holes and a part of the third yet to drill. Those were the lifters. In the meanwhile no blasts had taken place in this face. It was the custom of the mine to drill all the holes—a dozen ordinarily—and then load

(Testimony of Fred Whitsett.)
them with powder and set them off when the men went off shift. The purpose of that was, first, because they could not drill with holes loaded with safety; and second, to have the blasts go off at one time so that they would not interfere with work at other places. I do not know the appearance of a missed hole. I never saw one. I know that the purpose of putting the powder in is to blast the rock and I have assisted in loading the holes at various times; and a missed hole is a loaded hole that had not gone off; in other words, one in which the powder has not exploded. Where the blast or charge in a hole goes off, it breaks up the rock around the hole.

Q. And where a charge does not go off, it does not break up the rock? That is true, is it not?

A. I guess it is.

There were a great many faces in this mine, and we worked first one place, then another, drilling holes and loading the holes with explosives. I did not know that after the blasts were exploded a man came along with a bar and barred down the loose pieces of rock. I did not see him do that. I know that the muckers removed the pieces of rock that fell down on the ground. I did not see any mucking done at the place where the accident occurred. When we went to work there, there was a very small [83] amount of muck on the ground, probably about 4 inches in depth, scattered over the floor of the tunnel, but there was none against the face that I know of. I suppose that the mucker scraped it away. It was done when we got there.

(Testimony of Fred Whitsett.)

Q. How far back from the face was the muck straight back?

A. Probably halfway across the tunnel; it is hard to tell. By the tunnel I mean the depth and between that muck and the face, where we were working at 2, there was no muck, none near the face. The holes are ordinarily drilled 4 or 5 feet deep and 4 or 5 sticks of dynamite are placed in each hole. Sometimes they put just a little mud on top of them. There is a cap and from the cap a fuse runs, a separate fuse for each hole. When we go away after we have loaded the shots and lighted the fuses, the fuses are sticking out, one out of each hole. The length of the fuses differs, some of them are 5 or 6 feet long. On the evening of the accident we got to this face probably 10 minutes after 8, but we had to wait for steel and it was 10 o'clock when we got the drill working. When I first went to the place 2 I remained there probably 5 minutes, and during that time I looked at the holes that had been drilled by the day shift and I saw those that had been drilled by us. When we got to work there was a hole started but not completed. The holes are started with quite a large drill and drilled 7 or 8 inches and then a little smaller drill is used, and that is what we were waiting for. When they came I took four of them I think over to the place 2. They weighed about 25 pounds. At times I operated the drill. To do that I turned the crank or valve that let in the air, and also turned the crank that threw the [84] drill into the face of the hole. That was all that it

(Testimony of Fred Whitsett.)

was necessary to do in the drilling part. That does not require any great strength. When I worked as chuck-tender my duties were to take the drill out of the chuck whenever necessary and to put in another drill. The drill was tightened in the chuck with a monkey-wrench; and besides *was tightened in the chuck with a monkey-wrench; and besides* that, it was my duty to pour water into the hole while the drill was in operation. That work did not require any great strength.

Q. Did you observe there when you went to work that evening, either when you first went there about 8 o'clock, or the second time when you went there about 10 o'clock, a missed hole alongside of the one that you began drilling? A. No, sir.

Q. Did you see any drilled hole there?

A. I did not.

Q. About how high from the bottom of the drift was this hole, the lifter, that you were drilling?

A. I should say about 6 inches.

When I brought the steel I put a drill in the chuck. The mouth of the chuck was then about 6 inches above the ground. Before I put in the new drill I took out the old one. In order to do this I stooped over so that my head came within about a foot of the face and of the place where we were drilling. My face was then about 18 inches from the ground and I could see the face of the wall perfectly. When I went for the steel I left Frank at the machine and when I came back he was still there waiting for me. I knew Yokum and had seen him about the mine a

(Testimony of Fred Whitsett.)

few times. *I* was his duty to bar down and look for missed holes. I knew that missed holes sometimes occur. I had seen him barring down.

Q. You have seen a missed hole, of course? [85]

A. I don't remember whether I did or not.

Q. You don't know whether you ever did or not?

A. No, sir.

I never saw Yocum intoxicated.

Mr. CANNON.—We now offer in evidence, if your Honor please, the American Tables of Mortality to show the expectation of life of these plaintiffs.

Mr. WILSON.—I have an objection, if your Honor please: We object to the tables on the ground that under the facts shown in this case they are incompetent, irrelevant and immaterial, and that it is necessary for one relying on a mortality table to prove the life expectancy of a person to show that he belongs to the class of persons from which such tables are made.

The COURT.—Objection overruled.

To which ruling the defendant then and there excepted and now assigns the same as

ERROR NO. 25.

Mr. CANNON.—The expectancy at the age of 22 is 40.85 years; the expectancy of life of the father, 56 years of age, is 16.72; and the expectancy of the mother at 54 is 18.09.

Mr. CANNON.—The plaintiff now rests.

[Motion to Strike Certain Testimony.]

Mr. WILSON.—Now, if your Honor please, we move to strike out all of the testimony in this case

as to the incompetency of the man Yokum. We move to strike out all of the testimony in this case as to his being intoxicated, or seen intoxicated.

[Motion for Order of Nonsuit.]

Mr. WILSON.—And in the Reardon case we move that an order of nonsuit be entered upon the ground that the plaintiff has failed to substantiate the allegations of negligence in this case. Further, upon the ground that the evidence fails to show [86] any negligent act or omission on the part of the defendant proximately causing the accident and injury complained of; and further, upon the ground that it does not appear from the evidence in this case that the defendant negligently or carelessly omitted or failed to furnish the deceased, Frank Whitsett, with a safe place in which to perform his work.

And in the Fred Whitsett case we make the further motion that an order of nonsuit be made and entered therein upon the ground, first, that the plaintiff has wholly failed and neglected to show any negligent act or omission on the part of the defendant proximately causing the accident and injury complained of; second, upon the ground that there is no evidence in this case that the missed-shot man or the man Yokum was habitually intoxicated, or that his services were rendered inefficient by reason of any intoxication upon his part, or that the defendant knew, or had reason to know of his habits of intoxication; nor is there any evidence to show that at the time of the accident and injury complained of, or immediately before that time, Yokum inspected the place where the accident occurred and

at that time was under the influence of liquor or inefficient in any way or manner, whatsoever; and on the third ground that there is no evidence in this case to show that by any act or omission on the part of the defendant the plaintiff was furnished with an unsafe place in which to work.

The COURT.—I will deny the motion to strike out the evidence indicated and likewise the motions for nonsuit.

To which rulings the defendant then and there excepted, and now assigns the same as

ERROR NO. 26, ERROR NO. 27. [87]

[Testimony of Ira L. Greninger, for Defendant.]

And thereupon the defendant, to maintain the issues herein on its part, called as a witness IRA L. GRENINGER, who, on being duly sworn, testified as follows:

I am an assistant chief engineer for a mining company and engaged in mining. I was employed by the defendant between two and three years and left them July 9th, 1911. I was foreman of the Balaklala Mine. I know Fred Whitsett and in his lifetime I knew Frank Whitsett. I employed them. I remember the accident in this case. I directed the Whitsett boys as to their work at the place of the accident. I remember the taking of the photograph. Prior to the time the photograph was taken there had been one round drilled and blasted in this cross-cut. It broke the cross-cut out from 3 to 3½ feet in depth. In the photograph the drill isn't pointed toward the cross-cut. The cross-cut appears behind Frank Whitsett in the photograph. At the time of

(Testimony of Ira L. Greninger.)

the accident he was running a machine. The duties of the machine-men were to set up their drills when going on shift, or ordered to do so, and drill holes according to the customary manner, and load them with powder and blast them. It was the duty of all machine-men to look for missed holes in order to protect themselves in cases where the missed-hole man was not for any reason able to find them, either being limited in time or from being covered with muck. I do not consider that it was the duty of chuck-tenders to blast missed holes, but it was the duty of each man in the mine to look for and avoid missed holes. A missed hole is one that has been filled with powder and failed to explode. At this place the appearance would be that of a round hole, very much the same as the end of a hole that had not been loaded at all. Such a missed hole would be readily seen, if it was above the muck. [88] If it was below the muck it would be harder to detect. In drilling lifters, the bottom holes in a drift. they are commenced a little above the level and extend quite a distance below the level of the drift in order to get the bottom of the drift on a level, and after the holes above have been once located and assurance made that they have been destroyed, it is not the practice to raise the muck in a depth as low as the bottom of the holes. We ascertain that the lifters have been exploded by testing the ground with a drill or piece of steel. With it we find that where a hole has been exploded the ground is broken and fractured, while if there has been no explosion,

(Testimony of Ira L. Greninger.)

the ground is hard.

Q. Who made such a test in this mine?

A. The bottom hole, the machine-men were doing that sort of work.

I have had experience in other mines; in the Blue Ledge Mine, Siskiyou County, California; in the Greenback, in Josephine County, Oregon, and Cherry Hill Mine, in Siskiyou County, California, and various others.

Q. Is there, or is there not, a custom among miners and drill men as to looking for missed shots?

A. There certainly is a custom for the protection of the miners themselves for them to look out for missed holes.

There were approximately 50 machine-men employed at this mine at the time of the accident and they were engaged in drilling about 25 different faces. In the mine I should say that there were altogether 50 or more faces. The blasting was done at the time the shift left the mine on account of the fumes of the powder making it impossible for the men to stay in the mine after the shots were discharged. If a machine-man discovered a missed hole, he was either moved to some other point for the [89] time being, or the machine was taken down and the hole blasted, depending on the local circumstances. It would be impossible to say how long before the Whitsett brothers went to work on this face that the other blast had been made. It was the duty of the muckers or laborers to remove the muck or broken rock after a blast. They usually

(Testimony of Ira L. Greninger.)

did this the next shift after the blast. I knew and employed Yokum. During the time that he was employed there I never saw him intoxicated, nor had any complaint ever been made to me about his being intoxicated. I have no distinct recollection of giving any instruction to either Frank or Fred Whitsett relative to their duty to look out for unexploded holes.

Q. Did you ordinarily on employing men give such instructions?

A. I did so instruct them and I always instructed my shift bosses working under me to call their attention to those things.

Cross-examination.

The drift from which the cross-cut 2 was being driven had been cut through for a month or a month and a half prior to the accident. In my capacity as foreman I was supposed to go to every part of the mine. It was my custom to, several times during the day, and I became familiar with every part of the mine. That is the reason that I can identify the photograph to my own satisfaction. I do not know how long before the accident the previous shots had been exploded at that particular place, from the fact, as I have stated before, the machine was moved from one point to another, and sometimes the face would be left with no one working in it from one to two or three days. In this case I do not know how long it was before the last round was [90] finished or exploded. Yokum's duties were to look for missed

(Testimony of Ira L. Greninger.)

holes and to bar down loose pieces of rock and to explode missed holes when he found them. B. Hall had charge of the underground work at night under my direction. After a round of shots were exploded on any particular face, the workmen would be removed to another face on the next shift, and the muckers would get to work cleaning away the muck from the place where the explosion had taken place.

Q. At what point of time would Mr. Yokum go around to examine for missed holes after the muckers had cleared away the muck?

A. It would depend on circumstances. He was supposed to be looking for the holes from the time he went on shift, when perhaps no muck had been cleared away, from noon time until evening.

Yokum had an eight-hour shift and was supposed to be looking for missed holes and barring down rock and firing missed holes all the time. We blasted every day shift somewhere. There were about eight or ten rounds at a shift. There was a missed-hole man for each shift. The operation of clearing the muck from any one place required a shift and sometimes more than a shift, so that a round of holes blasted at the end of one shift might not be cleared away by the end of the following shift. Sometimes the muck might remain in its place over a shift. The best time to examine the face was after the muck had been removed, but the exigencies of mining sometimes required the missed-hole man to examine the face before all the muck had been removed. If the missed-hole man found a face

(Testimony of Ira L. Greninger.)
clear in the course of his day's work and it was his part of the mine to look after, he examined [91] the face for the missed holes. If it happened that the face had muck in it, he would examine as far down as possible at that time and go on to the next place. Sometimes the drillers would be set to work at a face before the muck had been entirely cleared out. As a matter of fact, there would be no danger of hitting a missed hole in the upper part, which was always uncovered and plain to be seen, so that the missed hole would be detected without any trouble. The machine was moved down in the lower holes after the muck had been taken out. Sometimes the muck would lie halfway up. If the missed-hole man came to a place where the muck had not been entirely removed, it would be his duty to make an examination as far as possible. That would leave the bottom of it unexamined. As to whether or not the missed-hole man would go back after the muck was removed to further examine the same face, would depend on whether he was ordered to do so, or had time to cover those grounds. If he did not have time, it was the duty of the machine-men to make the examination. The machine-men were supposed to take that precaution for their own protection. It was his duty to examine the whole face every time he went to work.

Q. Then what was the object of having a missed-hole man?

A. It was this:We had in this mine many men employed as muckers, not acquainted with powder and

(Testimony of Ira L. Greninger.)

would not know it if they saw it. These bar men and missed-hole men were employed by me for the purpose of protecting those men and also leaving the upper part of the face clean, so that a machine could be set up when a machine had finished somewhere else.

My idea in employing the missed-hole men was to protect the inexperienced men. We did not have any written or printed rules or regulations of any character at that time. *There were* [92]

Q. Your superiors gave no direction, made no written instructions or rules of any character for the safety of the mine in the underground working of that mine?

Mr. WILSON.—I object to that question as immaterial and not cross-examination.

The COURT.—The objection is overruled.

To which ruling the defendant then and there excepted and now assigns the same as

ERROR NO. 29.

A. There were no rules in regard to the working of the mine, the underground working, except as I have stated, the ones that I laid down.

The rules that I laid down were by verbal instructions to my shift bosses and to the men themselves.

Q. To what shift boss did you ever give any instructions or direction that the missed-hole man was only hired for protection to inexperienced men?

Mr. WILSON.—We object to that on the ground that it is not in itself an instruction, and it is incompetent, irrelevant and immaterial, and not cross-

(Testimony of Ira L. Greninger.)
examination. The witness has stated what were the duties of the missed-hole man, and it is entirely immaterial whether this witness communicated those duties to anyone else or not.

The COURT.—The objection is overruled.

To which ruling the defendant then and there excepted, and now assigns the same as

ERROR NO. 30.

A. My giving instructions to three or four hundred men at the same time, having that many under me, I cannot call to mind any one instance or any instance by itself. [93]

I do not remember having communicated the exact words to any shift boss, but it was tacitly understood between us. I mean by that, such men as were employed as shift bosses understood it would be folly to employ a man to protect another person who did not know any more about the business than he did, and the machine-man was supposed to know how to handle powder, load holes and look out for his own protection, and it would be folly to hire a man of the same kind to look after it. We worked together with those ideas in my mind and no friction, so I assume they worked according to my ideas on those matters. I have no distinct recollection of ever communicating those rules to a shift boss at any certain time.

Q. You are assuming that the shift boss knew that? Knew what you had in your mind without your stating it to him?

A. I am assuming that we worked together to

(Testimony of Ira L. Greninger.)

that end and understood each other.

I never saw Yokum drunk or under the influence of liquor. I have no recollection of having asked Mr. Hall to discharge him because of his drinking proclivities. I knew that Yokum had the reputation of being a drinker when he was in town. It had not been communicated to me by Hall that Yokum had been hiding away from his shift boss when he was in the mine. I did not request Hall to get rid of him.

Redirect Examination.

I communicated my rules to my bosses verbally. As to the men, I often told them when I hired them what they should do, and also instructed the shift bosses to tell them. The shift bosses, in undertaking the position, knew their instructions, because when they were hired they were instructed what their duties should [94] be. We had no more missed holes in that mine than they do in others. I would say one per cent of the holes might have missed; that is an approximation. There are several causes for a hole to miss. One is, the removal or jerking out of the fuses from one hole by the discharge of another; by the rock flying from the first hole and pulling the fuse out of the second. It might be through a defective fuse or a defective cap or primer, or it might happen by the hole being wet and the primer or fuse becoming damp before discharge, and so not exploding. So far as Yokum is concerned, what I heard about his drinking was at the town Coram, about 4½ miles from the mine.

[Testimony of John M. Williamson, for Defendant.]

JOHN M. WILLIAMSON, called as a witness on behalf of the defendant, on being duly sworn, testified as follows:

I am a physician and surgeon.

Mr. CANNON.—We will admit Dr. Williamson's qualifications.

On Friday last I made a physical examination of Fred Whitsett. I found that he had sustained at one time or another a personal injury and that certain scars on his leg had resulted.

Q. With reference to the leg that you examined, state whether or not, in your opinion, the plaintiff, Fred Whitsett, has a good functional use of that leg?

A. I would consider that that leg is in condition for good functional use. With the exception of a scar on the under side showing a considerable amount of suppression, the condition of the leg, as far as development is concerned, is, in my opinion, satisfactory. There does not appear to be any muscular atrophy, and the various movements of the leg that he made in my presence were normal. I refer to contraction and extension. He complained **[95]** of his hearing. I held a watch about three inches from each ear and he claimed he could not hear it. His statement that he could not hear is what is called a subjective symptom; that is, a symptom which is claimed by the patient and which the observer has to accept or refute. In speaking with him, I spoke in an ordinary tone and I did not observe any great impairment of hearing, or any

(Testimony of John M. Williamson.)

impairment at all, as far as ability to listen to conversation is concerned.

Mr. CANNON.—We do not claim any great impairment of hearing, Mr. Wilson. We claim that it is impaired to some extent.

I did not find any impairment of his mentality. He answered my questions very intelligently.

Q. Did you or did you not discover anything in the physical condition of Fred Whitsett that would interfere with his ability to labor at the present time?

A. No. In my opinion the man is able to perform such labor at the present time.

The ability of a man to do work depends upon his general physical condition. I observed the general physical condition of Fred Whitsett when I examined him, although I did not examine the functional action of the heart, nor the condition of his liver or kidneys. I did not find in the examination of Fred Whitsett anything that would interfere or prevent his doing the work of the operator of a Burleigh drill in a mine. In my opinion, the man would be capable of operating such a drill. I think he could also work as chuck-tender at such a drill.

Q. Doctor, what is the nature of Bright's Disease, and what is the full effect of that disease upon the duration of life?

A. The term Bright's Disease is a conditional one. [96] It was formerly used to designate a condition that was marked by the presence of albumin in the urine. Now, there are several conditions of the

(Testimony of John M. Williamson.)

kidney that might give rise to albuminuria, as we call it. The condition may be acute or it may be chronic. It may involve the blood vessels of the kidney, and in fact the blood vessels of the entire physical system. It would come under the old classification of Bright's Disease. On the other hand, it might only involve the tubules, the secreting portion of the kidney, which is instrumental in separating that portion of the blood which passes out through the urinary tract as urine, or it may be due to a diseased condition of the connective tissue which adjoin the blood vessels and tubules. Any one of those terms could be put under Bright's Disease. I infer from what you tell me that this patient probably has a chronic condition of the tubules of the kidney, what we call a chronic neuphritis, meaning an inflammation of the kidney. A chronic neuphritis may drag along for quite a period, but a man subject to it is certainly a bad risk. He would not be considered or accepted by any life insurance company. If, in addition, a man has a degenerated condition of the blood vessels of the kidney, that would imply a degenerated condition of all the arteries, and he is on the edge of dissolution, we might say, at any time, because he could have a hemorrhage of the brain. That is quite a common termination of what is known as Bright's Disease. The term Bright's Disease has come to be employed in a popular way to designate almost any disease of the kidneys.

Q. What, in your opinion, would be the tendency

(Testimony of John M. Williamson.)

on the period of life of a woman 54 years of age who had for eight years been suffering from a change of life and other things, one-half the time or thereabouts bed-ridden? [97]

A. If she was bed-ridden half the time, I should consider that her physical condition was not good.

Cross-examination.

The change of life in a woman is considered to a certain extent a critical time. There is a remote possibility that she might die as a result of conditions arising during that period. After she passes that time, very frequently she regains her health and lives to a good old age. During the time there are mental conditions that are sometimes very serious. From the fact alone that a change of life is taking place, a physician could not determine whether the length of a woman's life would be shortened or otherwise.

The fact that Bright's Disease had existed for ten years would indicate a chronic condition. An acute attack of Bright's Disease is one that might either have a fatal termination or a recovery might take place within a very short time, or it might turn into a chronic condition. When the disease has become chronic a physician may in some cases approximate how long the patient will live. I do not, however, consider the mere statement that a patient has Bright's Disease, and has been suffering from it for 10 years, sufficient data upon which to draw any conclusion as to the duration of a patient's life.

(Testimony of John M. Williamson.)

I never operated a Burleigh drill in a mine. I examined Fred Whitsett's head during the examination that I made, and found a number of small scars and powder marks.

Q. Did you find one of the scars, the principal scar in his head, still soft?

A. Well, I would not say it was soft. I found a slight linear depression underneath the scar. **[98]**

I consider the bone in good condition at the present time.

Q. You don't know, do you, you are not in a position to say from the examination which you made, as to whether there is or may be any sort of pressure or any improper condition resulting from that on the brain?

A. It is a matter of a little more than three years since the accident, I understand.

Q. About that.

A. I would consider that the chances for anything in the future occurring would be very remote.

If a piece of bone worked out of that scar within the last year, I do not consider that would have any effect on that portion of the head underneath the scar. I examined the plaintiff's right arm. I could not say that I found any weakness, but I found the muscles on that side to be not quite up to the par as compared with the other side. The muscles were flabby to a certain extent. I found that the bone differed somewhat in contour above the right elbow, but he had enough muscular tissue to mask, to a great extent, the character of the thick-

(Testimony of John M. Williamson.)

ening; to the best of my judgment the bone was fractured above the elbow, but has made a very good repair and in good line. As the matter stands at the present time the muscles on the right arm are not as well developed as those on the left. It is, however, just as good an arm as many a man has that is going around with perfect health, with a normal arm which he is not using in physical work. It is not an arm that would enable him to perform the maximum amount of labor. With respect to the plaintiff's leg, I found a very deep depression on the inner side of the thigh, indicating that there had been a deep wound there, which involved to some extent the tearing of the muscles. The leg was slightly smaller **[99]** than the other, half an inch in circumference. In my opinion, that leg would be capable of sustaining exertion on account of the position of the scar. That would indicate that the injury had been received mainly between the two planes of muscles which, respectively, one upon the front and the other upon the back of the thigh. There did not seem to be any impairment of the group of muscles in front and very little of those on the back. I would not consider that the fact that the bone had been scraped for quite a period would weaken the leg, because nature very frequently rebuilds bone that is lost in that manner, and the bone might be just as strong, and even more bulky, than it was before the accident. The tenddency, of course, would depend entirely upon the amount of bone lost and the amount of repairs that

(Testimony of John M. Williamson.)

had taken place, that is, of compensatory repairs.

Q. Now, in the case of a person strong and rugged, sustaining such an accident as you have heard described, and the effect of which you have seen to some extent, who has never since that accident regained his weight by 30 pounds, and complains of weakness and exhaustion, and inability to lie in bed, compelled to sit up at night, to sit up in bed the night, propped up on his pillow, that is a constant condition, if he lies in bed subjected to attacks which almost blind him, confusing sounds in his head, and such things, in a case of that kind, the natural processes of repair, would they be interfered with or hampered to any extent by that condition?

A. Well, you have carried that into the realm of subjective symptoms.

Q. Well, assume that these subjective symptoms exist?

A. I do not consider that they would interfere with the repair of the bone. **[100]**

If all these subjective symptoms that you have stated are admitted as existing, I would not call the man in healthy condition. Assuming that those conditions exist, I would not call him a sound man.

Redirect Examination.

From my own examination of the plaintiff in this case I would call him at the present time in fairly sound condition. It is my opinion that in his case the tendency would be toward further improvement in his health. In my opinion the reason

(Testimony of John M. Williamson.)

why the muscles of the plaintiff's arm are flabby and in not as good condition as the other arm is that they lack use. If they were used, there would be a gradual enlargement, restoration of the muscles to normal capacity and normal bulk and improvement in strength. It is a common thing for broken bone to work out in the process of healing. It indicates that the bone, which has been devitalized, is passed off by natural processes.

Recross-examination.

The coming out of the bone would not indicate a prospective necrosis or deadening of the bone. It might indicate a necrosis, and it is the method of nature when bone becomes necrosed to throw out a healthy barrier or layer around it, and, as it were, pry it off from it. Then again, on the other hand, the piece of bone might be detached entirely from the main bone at the time of the injury. It would simply lie in the tissue and act as a foreign body and the natural tendency is for foreign bodies to travel in the line of least resistance and work out. My opinion as to the condition of Mr. Whitsett is based upon the objective symptoms alone that I found. **[101]**

[Testimony of Christa B. Hall, for Defendant.]

CHRISTA B. HALL, called as a witness on behalf of the defendant, on being duly sworn testified as follows:

I am the man who has been mentioned as B. Hall, and was employed by the defendant as night shift

(Testimony of Christa B. Hall.)

boss at the time of the accident. I am familiar with the place where the accident occurred. I know Fred Whitsett and I knew Frank in his lifetime. I do not know whether the Whitsett boys or the day shift set up the machine. I do not remember that I assisted in setting it up. I know Yokum. I saw the place where the accident happened probably an hour before its occurrence. I did not at that time, or any time, tell the Whitsett boys, or either of them, to beginning drilling in a hole that had been partly drilled, and I did not at that time see a missed hole in the face of that drift, or about there anywhere. I had never seen Yokum intoxicated while at work, or in the mine, nor had I ever seen him intoxicated while I was at the candle-house and the men were getting their checks and candles. At no time was there any complaint made to me about Yokum's being incompetent through drinking, nor any complaint made at all. I did not at any time ask Mr. Grenegar to discharge Yokum, and I did not ask Grenegar, or any other person, to discharge Yokum because he was intoxicated while on duty. I had the right to discharge anybody under me in my shift, including Yokum.

Cross-examination.

Grenegar never asked me to discharge Yokum, or say anything about discharging him, nor did he ever say anything about Yokum's drinking, or that he was not a good man, and that I should discharge him. [102]

Q. Did you not say to Mr. Grenegar that you did

(Testimony of Christa B. Hall.)

not want to discharge him because they would give you an Italian, or someone who could not speak English, and you would have to go with him from place to place in the mine and show him what to do, and that would make you back-track on your work; did you not say that? A. Not to Mr. Grenegar.

Q. To whom, if anybody, did you say that?

A. I could not place. I don't know whether I said it or not. I did not say it to Mr. Bishop. I took no orders from him. I do not remember to have stated to Lawrence Whitsett or Enos Wall, since this trial began and here in San Francisco, that they wanted me to discharge Yokum because of his drinking habits and that I did not want to discharge him because they would give me an Italian or someone who could not speak English, and I would have to go with the Italian and show him the things that he had to do, and he would make me back-track on my work. I had heard of Yokum drinking and I saw him once drinking a little on the mine premises.

Q. Was he under the influence of liquor at that time? A. You would tell he was drinking.

I did not know that he was in the habit of hiding away from me in the mine or on shift. When I was at the place where the accident occurred, about an hour before the accident, Fred was there. Some time between 8 and 10 o'clock on that evening I took him to another part of tunnel No. 4 to show him where to set up when he had finished the other two holes and a part of another that was left to be

(Testimony of Christa B. Hall.)

done at the place where the accident occurred. On the evening of the accident I did not put the **[103]** Whitsett boys to work at the place 2. I came along there afterwards. I did not look to see what was done there. They knew what to do. I made no examination of the face there at all. I did not see Yokum around there that evening, although he was in that neighborhood the night before. I do not know how long prior to the accident he was in that part of the mine. There was a shift boss under me by the name of Meyers.

Redirect Examination.

Q. You say that you heard of Yokum drinking. What time did you hear of his drinking?

A. He was downtown and I heard he was full. That is all I heard.

He was at Kennett, 10 miles away. I stated that I had seen him drinking at the mine on one occasion; that was at the bunkhouse and before the accident. I don't know whether it was a month or six weeks or 10 days before. That is the only occasion that I ever saw him drinking or under the influence of liquor.

Recross-examination.

Yokum was not there long after the accident, maybe two weeks. The mine was shut down about five weeks after the accident. After the accident Mr. Grenegar ordered me to put Yokum on the other shift. **[104]**

[Testimony of John H. Meyers, for Defendant.]

JOHN H. MEYERS, called as a witness on behalf of the defendant, on being duly sworn, testified as follows:

I am a miner and have been for 22 years. I am acquainted with the defendant's mine and was employed there as shift boss on the night shift at the time of the accident. I worked with Mr. Hall. I would go to one end of the mine and begin and Mr. Hall began at the other and we would work toward each other until we met, placing the men and setting up the machines and showing the muckers where to work I know Fred Whitsett and in his lifetime, Frank. I am acquainted with the place where the accident happened. I was there some time every night. I directed that the machine be set up there. Just one round had been taken out of that cross-cut. The muck was pretty well cleaned up. There was nothing to interfere with their setting up. I could see the face tolerably well. I did not examine carefully, just walked up and looked it over. I could see no reason why they should not set up there. I did not discover a missed shot. The drills are of different diameters according to the length. The hole is started at something like three inches and drilled a foot or a foot and a half Then a second drill of smaller diameter is used and another foot and a half drilled, and then a still smaller drill. After a hole is drilled it is readily seen. It is very plain in the face of the drift

(Testimony of John H. Meyers.)

or cross-cut. After a round of holes are drilled they are loaded with dynamite, which is tamped in with a stick, and each charge is then connected with a cap and fuse. The fuses are cut at such length as will make the holes go off in rotation. After the shooting the muckers go in and clean it out. There was a little loose muck lying around the bottom, but [105] nothing to interfere with the process of setting up the machine. Where a missed shot appears, its appearance depends a good deal on where it is, whether it is in the center or the outside. A missed hole on the outside would leave a bunch of ground, which would indicate that the hole had not broken it. It would leave a mound of material unblasted, not broken, and it could be seen the moment you walked in. It would be possible for the rock to so break that it would conceal a missed shot, and that is the way they come at times to miss discovering them, because they are concealed. I knew Yokum. His principal duties were to bar down loose ground for the muckers, and, if he saw any missed holes, to shoot them, or see that they were shot. It was not his duty to remove the muck.

Q. What was the duty of the machine-men with reference to discovering missed holes?

A. The machine-men—I don't know that you would call it a duty. Of course, we did all we could about missed holes and things like that.

The custom there was the same as in any other mine. Machine-men are naturally always on the lookout for missed holes.

(Testimony of John H. Meyers.)

Q. I want to know, is it or is it not the custom in mining for machine-men to look out for missed holes?

A. Every place where I worked they did.

And they did in this mine. Some chuck-tenders looked for missed holes and some did not. That is a thing that is so thoroughly understood among miners that there is no such thing as duty attached to it, and no such thing as instructing them concerning it. Independently of instructions, most all of the drill men and chuck-tenders looked for missed holes. I knew Yokum. I had **[106]** never seen him at or near the mine under the influence of liquor, nor did I ever see him on his work in that condition. No complaint was ever made to me about Yokum. When I told the Whitsett boys to set up their machine at this place, I did not see a missed hole in this face, nothing to make me suspicious of anything like that. When a missed shot is discovered it is usually fired. Sometimes, if there is only just a little powder left in the hole, they take a stick and pick it out. We used a gelatine powder in that mine, which comes in sticks. It needs a hard concussion to explode it. I have no positive knowledge that Yokum inspected the face of this cross-cut before the accident. I looked at the face when I set these men up there and saw nothing.

Cross-examination.

I directed the Whitsett boys to go to work at this point the night before the accident. I knew that a

(Testimony of John H. Meyers.)

cross-cut had been ordered at this particular place by Mr. Grenegar, so that the men were set to work at that place really indirectly under the orders of Grenegar. All my orders came from him. There has been one round fired there a shift or two before I set the Whitsett boys at work at that place. I do not know who blasted that round. I remember a man by the name of Piper did some drilling on that first round. On the night of the accident I was at that place shortly after the shift started. I saw the drill was in position, but whether they were drilling or not, I do not remember. When a machine had been set up in a face of a particular cross-cut, that machine was used by the succeeding shifts until the holes were ready to be fired. It was then taken away to a safe place. After the shots were fired and the **[107]** muck had been cleared away the machine would be taken back and set up again for a new round (On being shown photograph.) I know for a positive fact that this photograph was taken as that bar set there in that cross-cut, but I could not tell by the photograph the direction in which the main drift proceeded. I am not an expert on photographs. I could not say how long I had been employed in the mine at the time of the accident. I was there only six weeks altogether. Yokum was there all that time. His duties were to bar down rock and to examine for missed holes and shoot them, and if he had any extra time he would do other work. When I went to the point of the accident on the evening of the accident the muck

(Testimony of John H. Meyers.)

was pretty well cleared away. At the time of the accident I heard a shot as I was going down the man-way. I knew there was an accident because nobody shot there between times when the men on shift were still around. I went there. The smoke was still pretty thick. We carried one of them out and had to get a stretcher to carry the other one. I looked at the place where the blast had gone off. It was at the same cross-cut at which I had set the Whitsett boys at work the night before.

Redirect Examination.

After the Whitsett boys had worked at this cross-cut to the end of their shift on the first night, they were followed by the day shift. That shift worked there all day.

[Testimony of C. F. Yokum, for Defendant.]

C. F. YOKUM, called as a witness on behalf of the defendant, on being duly sworn, testified as follows:

I reside at Butte, Montana, and am a miner by occupation **[108]** and have been for the past 20 years. I was employed by the defendant at the time of the accident and knew Frank and Fred Whitsett. I was hired to bar down, and a day or two later the shifter gave me orders to look out for missed holes and shoot them when I could, otherwise have the machine-man when I could not. I had nothing to do with the muck that accumulated on the floor of the mine or drift or cross-cut after a blast. All I had to do was to examine as far down

(Testimony of C. F. Yokum.)

as I could and go along about my other duties, whatever they might be. Prior to the accident I examined the face of this cross-cut as far as I could.

Q. You say you examined it as far as you could. Was there anything there to prevent a complete examination?

A. Well, there was a little muck that the lifters had thrown up, and, of course, I could not examine this closely without mucking it out, and, therefore, I never stopped to do it.

Q. Was it or was it not your duty to muck out at that place?

A. No. This examination was before the night shift came on to bore the second round of holes in that cross-cut. The drill was not yet set up. I did not find any missed holes there.

Q. At the time that you made that examination that you have spoken of, were you sober or intoxicated? A. I was supposed to be sober.

Q. Were you sober?

A. Yes. At no time while I was employed at this mine did I go on work intoxicated. Off shift I have had several drinks with the boys around and felt pretty good at times, but not going to work. I never went to work intoxicated or under the influence of liquor and cannot remember to have ever gone into the mine while under the influence of liquor. I never at any time gathered with [109] the men at the candle-house in an intoxicated condition, or in a condition where I was under the influence of liquor, and I never at any time while under

(Testimony of C. F. Yokum.)

the influence of liquor went to sleep on a muck pile in the mine.

Q. I will read you part of the testimony of Mr. Lawrence Whitsett.

"Now, you have spoken about Mr. Yokum. How long have you known Mr. Yokum?

"A I should judge about five years.

"Q. You say that on several times during the time that you worked at this mine you saw him drunk? A. Yes.

"Q. I want you to tell me when you saw him drunk? A. Before going on shift.

"Q. Let me take the last time you saw him prior to the accident. Where did you see him intoxicated? A. Before going on shift.

"Q. I mean at what place more exactly?

"A. At the mouth of the tunnel where the men got together to go underground.

"Q. You mean the entrance into the mine?

"A. Yes.

"Q. What made you think that he was drunk? A. Well, he was staggering around.

"Q. How long before the time of the accident did this occur? A. Probably two weeks.

"Q. On what day of the week?

"A. I could not say about that."

Is that true that I have read to you?

A. No, sir.

Q. Were you ever drunk or staggering around on the occasion testified to by this witness.

A. No, sir.

(Testimony of C. F. Yokum.)

Q. I will continue to read his testimony:

"Q. Now, when before that, did you see him drunk? [110]

"A. On several occasions.

"Q. I want to know the next occasion right back? A. Oh, I can't exactly answer that.

"Q Every few days? A. Yes.

"Q. Then a few days before this occurrence you have mentioned, you saw Yokum drunk?

"A. Yes.

"Q. What do you mean by a few days?

"A. Oh, probably a week.

"Q. A week?

"A. Yes, something like that."

Is that correct, is that true?

A. Well, I had been full a great number of times—feeling good to a certain extent.

Q. At the mine?

A. On the outside, among the boys.

Q. When going on shift?

A. No, not going on shift.

Q. I will read you from the testimony of Mr. Wall. Mr. Wall was testifying to Mr. Cannon:

"Q. What were the habits of Yokum during that time with reference to sobriety?

"A. Quite often he got under the influence of liquor.

"Q. What, with reference to the time he was on duty did you see, if anything, in that regard?

"A. I ran on him one evening when I was looking for steel, lying on a pile of muck asleep.

(Testimony of C. F. Yokum.)

"Q. Was his candle burning or out?

"A. His candle was out.

"Q. How long before this accident happened did that occur?

"A. I should judge about two weeks—ten days or two weeks."

Is that true? A. No, sir. **[111]**

I got fired about two or three weeks after the accident; it might have been less than two weeks; I know it was a few days.

Cross-examination.

As near as I can remember, I was discharged somewhere near two weeks after the accident. I was discharged the very day that I was changed from Hall's shift to Greninger. The latter discharged me. I was never asleep in the mine, intoxicated or sober, while on duty.

Q. Don't you remember an occasion when you were found there by Mr. Wall asleep?

A. No, or no other man. My duty was coming on shift to go around and bar down the place where I thought they were going to set up the next night. I was the only man barring down. I used my judgment and figured when they would shoot the holes from the work that they were doing, and I went around and barred down according to that. The muck was not cleared away when I barred down. I made my examination just as far down as I could, as far down as the muck would permit. When I examined the place where the accident occurred, the muck was not cleared away. I examined the place

(Testimony of C. F. Yokum.)

the night before the accident and that night these fellows set up. I examined before they set up and went away. I could not say when the muck was removed.

Q. Now, did you come back after the muck had been taken away to examine it?

A. No, that was not my business.

Q. Was it never your business to examine after the muck had been taken away?

A. The machine-men after they came on and set up—

Q. You have not answered my question.

A. (Contg.) —after they set up they are supposed to look out for them. [112]

I have examined the face on several different occasions after the muck had been cleared away, but where there was no machine set up. I was at that place about half an hour before the accident. Frank Whitsett was there alone, starting a hole, a lifter. The hole was in 5 or 6 inches, perhaps, and he seemed to be having trouble with it. I helped him line up the machine. The muck had been cleaned out. I did not look for missed holes at that time.

Redirect Examination.

I did not see any missed holes at any time in that neighborhood. I looked at the place where the drill entered the face of the cross-cut. There seemed to be muck there. I could not recall how much muck there was. Naturally, they cleaned away the best they could before they set up. I did not see any indication of a missed hole in that vicinity. At the

(Testimony of C. F. Yokum.)

time I barred down I made my inspection for missed holes. It was not my duty to look below the muck. The muckers might find a missed shot and report it, and the men who would be setting up would look out for them. Every man had to look out for himself.

Recross-examination.

Q. How did the machine-men know who were coming on to find a face of a drift or a cross-cut cleared of muck and ready for the machine to be set up; how did they know that place had been inspected?

A. They would have to take that on their own hands; as far as I could I did; I could not be all over the mine. From my knowledge of the manner in which the mine was run, there was no man whose duty it was especially to search for and shoot missed holes. It was more or less the duty of every one in the mine. **[113]**

Q. I will ask you this: Did or did not every miner employed on those premises have to look out for missed holes? A. Why, certainly.

Q. You only know that from supposition?

A. Well, most all the mines I have worked in for the last 20 years I had to protect myself. That is generally customary among all mines.

Q. But you were instructed two days after you took that job to look out for missed holes and bar down?

A. Yes, I was instructed by the shifters, and I was working under those instructions at the time of this accident.

[Testimony of M. D. Thomas, for Defendant.]

M. D. THOMAS, called as a witness on behalf of the defendant, on being duly sworn, testified as follows:

I have been a miner 30 years and worked in different mines in Colorado, Montana, California and Arizona. I am familiar with the defendant's mine and was foreman there a month or six weeks before the accident. There is a custom among miners as to examining for unexploded blasts. The custom is to examine the place before a drill is set up, and if there is a missed hole to report and don't set up. The duty rests upon the man that is working.

Q. Is there any custom in mines relative to the employment of a missed-hole man?

A. I never heard of it, except upon this occasion.

Cross-examination.

I was succeeded as superintendent and foreman of the Balaklala Mine by Mr. Greninger; he had been under me as shift boss; I left and went to another mine. **[114]**

Redirect Examination.

During my administration no missed-shot man was employed in this mine.

[Testimony of W. A. Pritchard, for Defendant.]

W. A. PRITCHARD, called as a witness on behalf of the defendant, on being duly sworn, testified as follows:

I am a graduate of Stanford University and a mining engineer. I have been superintendent and general manager of some twenty odd different com-

(Testimony of W. A. Pritchard.)

panies located in California, Australia and Mexico. I have been engaged in that business 14 years.

Q. Is there any custom among mine owners and miners relative to the detection of unexploded blasts?

A. It has always been left to the miners. By miners, I mean those men engaged in drilling and blasting

Q. Is there any rule relative to the employment of a missed-shot man in mines?

A. I never heard of a missed-shot man before this case.

Cross-examination.

I consider a chuck-tender a miner. They act as helpers and do their duties as miners. They change about in their position. The chuck-tender is waiting for a position as machine-man. The business of examining for missed holes devolves on both the machine-man and chuck-tender. Of course, the first day that a man is working as chuck-tender he would naturally be taking instructions from the machine-men, but as he works, after he has spent considerable time underground, he naturally would relieve the machine-man from some of that responsibility. The machine-man [115] orders him about. They work as companions in all the duties relative to their work and take turns about resting each other in their different duties. The machine-man teaches the chuck-tender to look for missed holes, how to drill, how to charge the holes, and to blast. It is not considered an apprenticeship but his instruction

(Testimony of W. A. Pritchard.)

lasts until some shift boss thinks enough of the man to make him a head man.

Q. Then when some shift boss thinks a chuck-tender has learned how to do the work of a machine-man and learned how to find missed holes, he is promoted to a machine-man, and from that time on the responsibility is on him as a miner?

A. Yes, sir. A man who did not learn about missed holes the first day he is underground, ought not to be permitted to enter again.

Q. Now, you say that a missed hole is very easy to detect after one day's experience in the mine?

A. One man can see as much as another.

Redirect Examination.

Q. Mr. Pritchard, what would you say would be the duty of a chuck-tender who had been employed six weeks and who was able to run a drill, as to finding missed holes?

A. His duty would be to find missed holes the same as a man who had been employed longer.

[Testimony of Edward A. Davis, for Defendant.]

EDWARD A. DAVIS, called as a witness on behalf of the defendant, on being duly sworn, testified as follows:

I am a mining engineer and have been about 25 years. I have been engaged in a large number of mines all over the Pacific Coast. **[116]**

Q. Is there a custom in mines relative to the duty of discovering unexploded blasts or missed shots?

A. Yes, sir, there is.

(Testimony of Edward A. Davis.)

Q. And through whose agency is that done?

A. The miners. By miners, I mean the two men at the drill. It is the duty of the chuck-tender to count the shots. Every round of holes fired is supposed to be counted by the men who fired the holes. Where ten or a dozen faces each contain 12 holes are exploded by the men in going off their shift, the proper method of procedure would be for them to look over the face of the drift or cross-cut, or whatever it was, after the shots had been exploded. That is the duty of the miners. It is not customary to place that duty upon a missed-shot man.

Cross-examination.

Where there is more than one shift during the 24 hours in a mine the custom is as I have described, but the on-coming shift makes the examination. The object of counting the shots is that if there is a hole that is not accounted for, it is the duty of the shift to go back before quitting the mine and find the unexploded hole and fire it. It is a rare thing for there to be an unexploded hole. It does appear once in a while but it is very unaccountable. Perhaps in a hundred rounds fired you would not get more than one unexploded hole. I have never seen, as well as I can remember, where shifts were working so closely that each shift could not count its own holes. Where the distances are 30 feet apart it would be difficult to count them. I have never seen just such a set of conditions as you ask me about. According to my own experience it is the universal cus-

(Testimony of Edward A. Davis.)

tom to count the shots. Where there were three cross-cuts being worked within 30 feet of [117] one another, they would be fired one round after the other, and counted. If there was no doubt about the number of holes counted, it would be proof that all were shot. If they could not get back on account of the smoke to fire a missed hole, it would be their duty to report it to the foreman. The on-coming shift begins by barring down all the loose rock they can and throwing it back for the muckers, and looking at the face with reference to setting up again. I have never been in a mine where they employed a special man to bar down.

Q. I am asking you particularly as to what you said about what the shift should do when they come on with reference to barring down, in a case where the barring-down man is employed to do the barring down. Your testimony as to the duty of the on-coming shift in that respect does not apply, does it?

A. Yes, sir, it does still apply.

Q. How can there be any duty on the part of the on-coming shift to bar down when the barring down is done by somebody else especially employed for that purpose?

A. No, sir; in that case there would not be any duty on them because the work would have been performed already. It is the duty of the on-coming shift to bar down, if that work has not been done, and to set up and to go to work and throw the muck back and to look over the place generally. If they had another place for the men to drill, the muckers

(Testimony of Edward A. Davis.)

would throw back the dirt and take it away, run it out. The drillers would not handle it. They would simply look at the face and set up with reference to the best point to drill again. **[118]**

Redirect Examination.

They would look at the face to see that it is all right for drilling and that everything is in good shape to go ahead. They would look over the whole face for instance, in a case of this kind to see that there is no unexploded hole.

Q. Now, take the case of a mine that has a large number of drifts and cross-cuts exceeding a mile or a mile and a half in length, where work is proceeding on say, 50 faces, and where each shift has a gang of drillers of 25 men operating on 25 of those 50 different faces, and where at the conclusion of each shift 10 to 15 faces are blasted, and owing to the nature of the ore it is necessary for the men to retire where they cannot count the shots, and where if they attempted to count the shots, they could not, because of the shots going off together, and other things relative to the sound of the shots, and where they could not locate the various shots that did discharge, and in a mine where the on-coming shift came in after the blast and the smoke had cleared away, whose duty was it to discover missed shots?

A. The on-coming shift.

Recross-examination.

If there is a missed-hole man employed for that purpose in such a mine, the duty would be on both of them to look for missed holes. In the case where the

(Testimony of Edward A. Davis.)

shots can be counted, it is the duty of the off-going shift to go back and discover missed holes, or if they could not go back, then to report to the foreman, but it is always the duty of the on-coming shift, as a matter of self-preservation, to look over the face before starting the drill. **[119]**

[Testimony of F. A. Gowing, for Defendant.]

F. A. GOWING, called as a witness on behalf of the defendant, on being duly sworn, testified as follows:

I am a mining engineer and have been since 1903. I am a graduate of the University of California. I have had experience in various mines located in Arizona, California, Nevada and foreign countries.

Q. Is there any custom in mines with reference to the duty of a drill operator to investigate or look for missed shots? A. Yes, sir.

Q. What is that custom?

A. To trim down the faces and see whether there are missed shots left in them.

The same custom applies to chuck-tenders. It is not ordinarily the custom in mines to employ a missed-shot man.

Cross-examination.

I have done other work besides mining engineering. I have mucked and drilled, worked a mill smelter, civil engineering and underground. I have worked as a common miner about 2 years. By trimming down the faces, I mean that after a round is broken in the drift or face, it is the custom of the on-coming miners, before they set up a machine or

(Testimony of F. A. Gowing.)

go to drill, to trim off all the shattered rock in the faces. It is called barring down. I never worked in a mine where there was a man employed for the special purpose of barring down, and I don't know anything about the custom where there is a man employed for that special purpose. When I say that it is not ordinarily the custom to have a missed-hole man, I mean that in all the mines that I have had any experience with, they have not had such a man, so I do not know what the custom is that prevails in mines where they have a missed-hole man.

HERE THE DEFENDANT RESTED. [120]

[Testimony of Lawrence Whitsett, for Plaintiff (Recalled in Rebuttal).]

LAWRENCE WHITSETT, recalled on behalf of the plaintiff, testified in rebuttal as follows:

In my experience in the big mines I never heard that it was the custom for the miner and chuck-tender to look out for and discover missed holes. In small mines it is the custom to count the reports. I have worked in 3 or 4 mines other than that of the defendant, where a missed-hole man was employed. I was never warned or instructed or directed in defendant's mine with reference to looking out for missed holes. I never heard of any custom in any mine with reference to the men going off shift after a round had been fired or going back into the mine immediately to look for missed holes. I have worked in 50 or 60 mines.

[Testimony of Enos Wall, for Plaintiff (Recalled in Rebuttal).]

ENOS WALL, recalled as a witness on behalf of the plaintiff, testified in rebuttal as follows:

I have been working as a miner 15 years. I never heard of a custom prevailing in large mines that the duty devolved upon miners to look out for missed holes. I know of a custom in large mines to have a missed-hole man. I have been employed in one mine, other than the defendant's, where they had such a man. I was never warned or given any instruction or direction by the defendant to look for missed holes. In small mines where there is one drift, no cross-cuts or raises, where there is only one shot fired, it is the general custom to go back after half an hour to look for the missed shots. When the photograph was taken the camera was placed on the opposite side of the main drift, about 20 feet away from where the machine sets. It was diagonally across the drift. The dark place in the center of the picture represents the main drift. **[121]**

Cross-examination.

I have worked in probably 25 or 30 different mines. It was in the Bingham Canyon Mine in Utah that a missed-hole man was employed.

[Testimony of Fred Whitsett, for Plaintiff (Recalled in Rebuttal).]

FRED WHITSETT, recalled as a witness on behalf of the plaintiff, testified in rebuttal as follows:

Q. While you were working in this particular

(Testimony of Fred Whitsett.)

mine prior to the accident, did you ever hear of a custom to the effect that it would be your duty to look out for missed holes?

Mr. WILSON.—We object upon the ground that having worked only at one mine he could not testify to a custom, and it would be hearsay, not rebuttal.

The COURT.—Objection overruled.

To which ruling the defendant then and there excepted, and now assigns the same as

ERROR NO. 30a.

A. No, sir. I was never warned or instructed or directed to do anything with reference to looking for missed holes in that mine. At the time the picture was taken the camera was about 20 feet away from us, kind of crossways the drift. The dark place in the center of this photograph represents the main drift.

HERE THE TESTIMONY CLOSED. [122]

Charge to the Jury.

The COURT (Orally).—Gentlemen of the Jury, I will ask your careful consideration while I proceed to submit to you the principles involved that must govern you in the consideration of the evidence in this case for the purpose of reaching a verdict. And in that connection I will suggest preliminarily in view of the fact that counsel have both taken occasion during their respective arguments to state to you what they deem the law to be, I shall ask you to disabuse your minds of any suggestions of that kind, not necessarily that they may be wrong, but

simply because the law requires you to take your instructions from the Court. That being so if the Court commits an error, and leads you into mistake by giving you law that is erroneous, there is a place to correct that; whereas if you were to get an erroneous view of the law from counsel, there would be no way of correcting any such error that might creep into your minds.

This case involves two separate actions, both prosecuted against the same defendant corporation, to recover damages alleged to have resulted from defendant's negligence. Both actions arise out of the same transaction, that is the same producing cause of injury, and as both are against the same defendant and involve a common inquiry the law permits them to be united and tried in some respects as one. But the right of recovery is in law in each action separate and distinct, and hence, as I shall more particularly advise you, will require a separate verdict at your hands in each.

In the case in which Fred Whitsett is plaintiff, the action is prosecuted by that plaintiff, in his own right, to recover for his own benefit compensation for [123] the loss and damage alleged to have resulted to him through the defendant's negligence in causing the accident *the accident* counted upon, and the resultant wounds and injuries to his person as set forth in the complaint in that action.

In the other action in which J. E. Reardon, as administrator of the estate of Frank Whitsett, deceased, is plaintiff, the action is prosecuted by the plaintiff to recover for the benefit of James Whit-

sett, the father and next of kin of the decedent, damages alleged to have been suffered by the father and mother through the death of the son, resulting, as is alleged, from defendant's negligence in causing the accident in which Frank Whitsett was killed. Such a right of action the law gives under circumstances such as those here alleged.

As the evidence discloses, and about which there is no dispute, the cause of the injury in both cases, as above indicated, was the same, that is, an accidental explosion in the defendant's mine. That accident is in both instances alleged to have occurred through the defendant's negligence, and therefore the essential element of the cause of action in each case is the negligence of the defendant.

Negligence, as a ground of recovery in a civil action, is always relative to some duty owing by the party guilty of the negligent act to the person injured thereby. In this case it appears without controversy that at the time of the accident in question Fred Whitsett and Frank Whitsett, who were brothers, were both in the employment of the defendant, working in its mine where the accident in question occurred. This employment gave rise to the relationship known in the law as that of master and servant as then existing between **[124]** the Whitsetts and the defendant. This fact, and the fact that the injuries sued for in both actions arose out of the same accident or occurrence, renders the principles governing the relations of master and servant, which I am about to state to you, applicable to the rights of the parties to both of the actions in-

volved, and you will so treat them.

It is implied from the contract of employment between the master and his servant, in the absence of understanding or agreement to the contrary, that the master shall supply the physical means and agencies for the conduct of his business, and shall also furnish to the employee a reasonably safe place to work. It is also implied, and public policy requires that in selecting such means and agencies and place for his employee to work, the master shall not be wanting in proper care. His negligence in that regard is not a hazard usually or necessarily attendant upon the business, nor is it one that the servant in legal contemplation is presumed to risk.

It is the duty of the master to use reasonable and ordinary care in furnishing a safe place for his employee in which to work, and whatever risk the employee assumes in carrying on the master's business will not exempt the master from that duty.

Reasonable or ordinary care is such care as an ordinarily prudent person would exercise under like circumstances.

A servant does not assume risks resulting from the master's failure to so furnish a safe place to work, whether the performance of that duty is assumed by the master or is delegated to another.

In other words, a servant, in the absence of agreement to the contrary, has the right to look to his employer for **[125]** the furnishing of a safe place to work, and if the latter, instead of discharging that duty himself sees fit to delegate it to another ser-

vant, he does not thereby alter the measure of his own obligation.

This obligation imposed upon an employer to use reasonable care in furnishing to his employee a safe place to work, and to keep that place reasonably safe, requires that where an employer places his employee at work in a place where danger to the employee may be reasonably apprehended, and such danger may be avoided by reasonable and proper inspection of such premises, it is the duty of the employer to provide for such inspection, unless by the terms of his employment it is made the duty of the employee to inspect it for himself, and if the employer fails to do so and in consequence thereof his employee while engaged in the performance of his work, in reliance upon the master performing his duty in that respect, is injured in consequence of such neglect, and without fault on the part of the employee, the employer is liable to the employee for such injuries.

But you will understand that this duty of an employer to furnish an employee with a reasonably safe place in which to work is not absolute. He is not required at all hazards to furnish a safe place. His duty is fulfilled when he exercises ordinary care for that purpose. If he exercises such care as men of ordinary intelligence would usually exercise under like circumstances and conditions, taking into consideration the character of the work, then he has done all that is required of him by the law and cannot be held liable for injuries received by his employee in despite of such precautions. The master,

in other words, is not an insurer of the safety [126] of his employees. And of course this doctrine has no application to an instance should you find this to be one where by the terms of his employment the employee is himself required to look out for and see to the safety of his place for doing his work.

As I have said, the degree of care required of an employer in protecting his employees from injury is merely the adoption of all reasonable means and precautions to provide for the safety of his employees while they are engaged in his employment, but this degree of care is to be measured by the hazards or dangers to be apprehended or avoided.

The failure of the employer to exercise such reasonable diligence, caution and foresight for the safety of his employee as a prudent man would exercise under the like circumstances is negligence; and for such negligence the employer is liable to the employee for injuries suffered in consequence thereof while the employee is engaged in the performance of his duties, and without fault on his part contributing thereto.

An employer is likewise liable to his employee for loss or damage suffered by the latter in consequence of injuries received by the employee in the performance of his duties when such injuries result from the wrongful act, neglect or default of any agent or officer of such employer superior to the employee injured, or of a person employed by such employer having the right to control or direct the services of such employee injured, and without fault

on the part of the employee directly contributing thereto.

It is alleged in the case of Fred Whitsett that the defendant employed an incompetent man as missed-hole man, [127] and that this fact contributed proximately to that plaintiff's injury. With respect to the duty of the employer to use care in selecting his employees or officers, you will understand that while he must use due care in that regard the employer does not warrant the competency and faithfulness of any one of his employees to the others in his employ. His liability is not of so strict a nature as that. His duty in the matter of employing and retaining and watching over his employees is measured by the same rule of ordinary care and prudence above stated, and if he has selected them with discretion and omitted nothing that prudence dictates in overseeing them, and observing the character of their work, he has done all that the law requires of him. If he has failed in this duty, to the injury of his employee, then he is liable therefor.

The presumption is that an employee who is competent and fit when he enters the service of his employer, remains so; but this presumption may be overcome by evidence that satisfies you that such was not the fact.

It is presumed that the employer has done his duty in this regard, and has selected competent employees; hence it is incumbent upon one who seeks to recover from his employer for the carelessness of a fellow-employee, to show, not only that the fellow-employee was in fact careless, but also that the employer had

knowledge of such carelessness, or by the exercise of reasonable care could have had such knowledge, or was negligent either in the selection or retention of such employee. There must be some neglect or fault in the employer proximately contributing to the injury before he can be made liable in this respect, and the burden of showing [128] such fault is on the one alleging it.

Where an employee complains that he was injured through the incompetency of a fellow-employee, it should appear that the incompetency of such fellow-employee was the proximate cause of the accident and injury. The mere fact that the fellow-employee may have been incompetent, and that the employer had knowledge thereof, is not sufficient, unless you are satisfied from the evidence that such incompetency was the cause of the injury, or a cause directly contributing thereto and without which the injury would not have happened.

An employee must himself use care for his own safety proportionate to the risks of his employment. Such dangers as are obvious to the senses, or which with reasonable care could be discovered, if a thing it is his duty to look out for, are under the law assumed by him, and he cannot recover for injuries resulting from such dangers, since it is his duty to use such care and precaution to avoid them.

To render the employer liable for injuries to an employee, the latter must have exercised ordinary and reasonable care for his own safety, that is, such care as an ordinarily prudent person would exercise under the same or similar circumstances. The de-

gree of care to be exercised by the employee must be adjusted to the character of the work and the limitations of his duty and should be in proportion to the dangers of the employment. Although a master may be negligent, yet if the employee is himself guilty of the negligent act which causes or directly contributes to his injury, he cannot recover.

Inasmuch as the defendant in this case is a corporation, it is pertinent to suggest to you that a corporation can only act by and through its agents and authorized representatives. **[129]** It is therefore responsible for the acts and omissions of its duly authorized agents to the same extent as a natural person would be for his own acts under like circumstances.

In other words, the negligence of the agents and representatives of a corporation, that is, its officers or employees, is the negligence of the corporation itself, and the corporation is liable therefor to an employee injured in consequence thereof to the same extent as would be a natural person under like circumstances.

An employer, whether a natural person or a corporation, is required under the law to indemnify his employee for losses caused by the employer's want of ordinary care, where the employee is not himself at fault.

An employer, whether a natural person or a corporate body, is under obligation not to expose the employee in conducting the employer's business to perils or hazards against which he may be guarded by proper diligence on the part of the employer.

The burden of proving negligence on the part of the defendant rests on the plaintiff, and before he will be entitled to a verdict he must produce a preponderance of evidence,—that is to say, evidence which is in some degree stronger than that opposed to it, and sufficient to satisfy you to a moral certainty, or that degree of proof which produces conviction in an unprejudiced mind,—that the defendant was guilty of negligence as charged, proximately causing the injury complained of. You cannot assume that the defendant was careless or negligent from the mere fact of the accident alone, or from the fact that plaintiff was [130] injured. The law presumes that defendant was not negligent but this presumption may be overcome by evidence satisfying you, to the extent I have indicated, to the contrary. It is for the plaintiff, as I say, to prove the negligence alleged, and when a plaintiff has introduced evidence sufficient to prove that charge, there is still no obligation on the part of the defendant to overcome it by a preponderance of evidence on his part. The burden of proof being on the plaintiff, all that is required of a defendant is that it produce evidence to offset, in the mind of the jury, the effect of the plaintiff's evidence, and if the jury find, upon the whole case as made, that the plaintiff has not shown by a clear preponderance of the evidence that the defendant was guilty of negligence causing the injuries complained of, that is, if, in your judgment, the evidence is equally balanced, you should find for the defendant. Or if you are satisfied that the accident was of a character which was unavoidable, then

the verdict should be in favor of defendant.

Should you find, as claimed by defendant, that instead of its being the duty of the missed-hole man, as claimed by plaintiffs, it was the duty of the miners employed by the defendant in its mine, working in the capacity in which the Whitsetts were employed, to examine the places in which they were put to work and look for missed shots or holes, and that the Whitsetts had been informed of that duty, and you determine that the explosion of a missed shot caused the injuries complained of, and that such missed shot could have been discovered by them by the exercise of due care, in such case, the Whitsetts being fellow-servants, neither plaintiff can recover for the negligence of the other, and your verdict **[131]** should be for the defendant.

It is contended in this case that the Whitsetts were chargeable with negligence on their part which directly contributed towards their injury. This constitutes a defense, if it is shown. The rule is, as I have before indicated, that when the plaintiff is in part responsible for his injury, through his own want of care proximately contributing thereto, though the defendant was also in part chargeable with negligence, no remedy is given in law. But in this defense the burden rests upon the defendant to establish it, and it must do so by the same degree of proof by which the plaintiff is required to prove his case, that is, by a preponderance of the evidence.

If you find that the Whitsetts were directly in fault in the matter of causing the accident and injury complained of, of course no damages can be recovered by

either one, since they would be guilty of contributory negligence which would preclude recovery.

In this connection, however, you will bear in mind that if you find that the defendant in operating the mine in question provided an inspector called a "missed-hole man," and that it was the duty of such employee to search for and discover missed holes or unexploded blasts, and to explode such blasts, or to report the existence thereof to his superior before the succeeding shift should go to work at any place where a round of blasts had been exploded, then any driller or chuck-tender regularly set at work by his superior at any place where it was the duty of such inspector to make such search and discover such unexploded blast, was entitled to assume that such inspector had done his duty in that regard, [132] and to act upon that presumption, and would not be guilty of negligence for failing to make such inspection himself.

By applying the principles I have stated to you to the facts as you may find them from the evidence, you will be able to determine which way your verdict should go.

As you have observed from the argument, the theory of the plaintiffs is that it was the duty of the defendant, through its agent employed for the purpose—the missed-hole men—to examine and inspect its mine at the point where the Whitsetts were put to work on the occasion in question, for the detection of any missed holes or missed shots, or other source of danger, that might there exist, and to take proper care to render it safe and harmless, and that the Whitsetts

were not charged with any such duty; that they had a right to rely upon this duty being performed by the missed-hole man, and were entitled to assume that it had been performed before they were set to work; that the defendant through its negligence and that of its officers failed to perform this duty, and as a result of such negligence the accident and injury resulted, without any fault or want of care on the part of the Whitsetts directly contributing thereto. Should you find this theory to be sustained by the evidence, to the degree I have stated, then the plaintiffs will undoubtedly be entitled to recover, and your verdict should be in their favor.

The defense of the defendant, on the other hand, is, as before indicated, that under the terms of their employment, and the known manner of working the mine, it was the duty of the Whitsetts to look for and detect any such missed holes or unexploded blasts that might exist at the place of their employment and that this duty did not rest upon the defendant; [133] that it was wholly through the negligence of the Whitsetts in failing to take proper precaution and make an examination of the face of the cross-cut, that the explosion and injury occurred, and that defendant was in no respect responsible therefor. It is further claimed by the defendant that even if it can be held under the evidence that it was its duty to look after missed holes or unexploded blasts, the evidence shows that it took all due and ordinary care in this instance to discover or detect any such; and that if it was a missed shot which caused the injuries complained of, it appears that it was so concealed as

to baffle and defeat any ordinary means or precaution for discovering it; and that consequently the defendant did all that its duty demanded and cannot be held responsible for the injuries complained of.

Should you find that these defenses, or either of them, is sustained by the evidence, then it is sufficient to excuse the defendant, and your verdict should be in its favor. These questions rest with you.

As previously suggested to you, the right of recovery in these two actions being separate and distinct it will be necessary for you to find a separate verdict in each one of those actions.

As to the action brought by Fred Whitsett, which is to recover damages on his own behalf, the law is that every person who suffers detriment from the unlawful act or omission of another may recover from the person in fault a compensation therefor in money which is called damages. For the breach of an obligation not arising from contract (and this is a case of that character), the measure of damages is the amount which will compensate for the detriment or loss proximately caused thereby, [134] whether it could have been anticipated or not. If, therefore, in the case of Fred Whitsett, you find, under the principles that I have stated to you, that the plaintiff is entitled to recover, you may award him such compensatory damages within the amount claimed in his complaint ($50,750) as will in your good judgment compensate him for the pecuniary damage proximately caused by the injury suffered by him, if any, as the result of the accident complained of; and in this connection you may consider his earning capacity at

the time of the accident, his physical capacity at that time, and the physical and mental suffering, if any, which has been caused to him as a result of his injuries, the extent and severity of those injuries, the degree and character of pain suffered by him, if any, and its duration and severity. You may also consider whether the injuries are temporary or permanent; and from all these elements resolve what sum will fairly and reasonably compensate the plaintiff for the loss suffered through such injuries. If you find that his injuries are more or less permanent, you may also take into consideration the loss, if any, which he will be reasonably certain to suffer in the future as a result of such injuries, and in determining this question you may consider, in connection with other evidence in the case, his probable expectation of life.

In the action brought by the administrator of Frank Whitsett, deceased, should you reach the conclusion that the plaintiff is entitled to a verdict you will award such amount as in your judgment will be a reasonable compensation to the father and mother of the deceased, for whose benefit the action is prosecuted, for the actual pecuniary loss suffered by them from the death of their son. That is, your verdict [135] should be limited to that amount which the evidence shows that the deceased would have probably earned, and, after paying his own expenses for his food, lodging, clothing, and the necessary and ordinary expenses and costs of living, would have given or turned over to his father and mother for their own use. The law measures the injury or loss suf-

fered by the father or mother in a case of this kind in dollars and cents. It does not take into account their grief and sorrow over the loss of their son, as that is an element which the law does not undertake the measure in pecuniary damages. In other words, the damages must be simply remunerative, and that remuneration must be restricted to such sum as will amount to the reasonable expectation that the father and the mother had of pecuniary or money benefit arising from the continuance in life of the deceased. That is the question to be determined in such a case, and you should not, in reaching your conclusion, speculate as to the amount or indulge in presumptions or conjectures not warranted by the evidence, but you should determine the amount solely by the evidence introduced before you entirely free from any sentiment or sympathy on the one hand, or bias or prejudice on the other. In reaching your conclusion in this case, as in the other, you may regard, with the other evidence in the case, the expectancy of life of the deceased and of those to be benefited by the recovery. In most cases it is the expectancy of life of the deceased alone which is the element to be considered by the jury, but in a case like this, where the respective ages of the parties entitled to recover and of the deceased indicate that the expectancy of life in the beneficiary is less than that of the deceased, it is the expectancy of life of the beneficiary of the recovery [136] that must be considered in fixing the damages.

Standard life or mortality tables are admissible in such an action to aid you in your inquiry. Such

tables are not conclusive upon the question of the duration of life, but are merely competent to be weighed, with the other evidence in the case, tending to show the state of health, habits of life, and other conditions, as well as the vocation in life of the beneficiary. In any given case the expectancy of life of the person under consideration (in this case the beneficiaries) may be greater or less than that of the average person, and the amount of damages to be allowed should be increased or diminished accordingly. In applying these instructions to the case which we are now considering, you will, of course, be governed by its facts and circumstances as proved. You are dealing simply with the question of compensation for the loss suffered. The law does not contemplate that the estate of the beneficiaries should be increased beyond what they have actually suffered.

Now, gentlemen of the jury, those are all of the specific features of the law that I care to state to you. There are some general considerations which perhaps should be suggested to you, and that is that the jury alone pass on the facts of the case. That duty rests on your shoulders, and it cannot be shared by the Court. It is neither the purpose nor the intent of the Court, nor its privilege to in any wise influence, or undertake to influence the jury in their deliberation on the facts. As I say, that is something that rests on your conscience alone. And if you have gained any idea throughout the trial of the case, or any impression, as to the attitude of mind of the Court, you should dismiss it entirely from your minds, not only because no such purpose [137]

would be in the mind of the Court, but because it should not, even if it were so, affect your deliberations in the case. You are to determine this case for yourselves from the facts as they are delivered from the witness-stand.

In passing on the facts you become also the judges of the credibility of the witnesses. You determine that, of course, not arbitrarily; it must be in subordination to the principles of law, and the rules of evidence, but it rests with you to say what degree of credibility you will accord to any witness who comes on the stand. You determine that by observing the character of the witness, his manner on the stand; the character of his testimony, how far it is such as to be probable, and in accord with your own reason, or how far it appears to be improbable either inherently, or when viewed in connection with all the evidence in the case, and you will say to what extent you believe any witness that is sworn on the witness-stand.

A witness is presumed to tell the truth, and he is to be accorded that presumption unless the manner of his testimony or what he testifies to, or the other evidence in the case affecting his testimony satisfies you he is not telling the truth; but if you make up your mind that a witness is not telling the truth because he is mistaken, then while it should make you more careful to weigh the balance of his testimony, you are not called on to discredit his testimony simply because he has made a mistake; and if you determine in your minds that a witness has come on the stand, and has recklessly and intentionally sworn

to a falsehood, something he knew not to be true when he was stating it, you should very carefully weigh his evidence in other respects, and entirely discredit it, [138] unless you are satisfied from the other evidence in the case he has in some respects been telling the truth. When there arises in a case, such as there has in this, a conflict in the evidence on any given point, it rests with the jury to resolve that conflict as best you may, and you do it by applying the principles I have just been stating to you, and determining which of the witnesses engaged in that conflict of testimony have been telling the truth. There are one or two points in this case where the evidence is decidedly conflicting, and I can afford you no greater aid than I have already indicated to you for solving those differences. It simply rests with you. Happily in my mind in cases of this kind it does rest with the jury, because your minds are not circumscribed by the same considerations which flow from the mind of the trained lawyer, or Judge, growing out of his knowledge of strict principles of law, and rules of evidence. Your minds are freer than that. You look at it from a plain common-sense point of view of the man who is unhampered by technical considerations, or rules, such as sometimes beset the mind of the Judge. I think you will have no difficulty in this case in resolving what the facts are, and determining what your verdict shall be in these two cases.

Of course, gentlemen, as has been suggested to you, there is no place in the administration of the law, either in this or any other case, for the play

of sentiment. We do not deal with that in courts. We must determine cases upon the evidence in the light of the cold law, and you will bear that in mind. Whatever the rights of these parties are, are to be determined upon those lines. If these two boys, —the one a plaintiff, and the other represented by his administrator—suffered the injuries of which they complain under circumstances [139] which you find within the principles I have stated to you to render the defendant liable, they are entitled to compensation. If they did not, they are not entitled to compensation. It is simply a question of law and fact; the law I have given you, or endeavored to give you to the best of my ability, and the fact rests with you.

The Clerk has prepared forms of verdict which you will find to accord with instructions I have given to you as to the necessities, and when you have reached a conclusion you will come into court and report.

You all understand, gentleman, that in the federal courts the verdict of the jury must be unanimous, and cannot be rendered by less than the entire jury. Are there any exceptions?

[Exceptions to Certain Instructions Given and Refused.]

Mr. WILSON.—The defendant excepts to that portion of the charge relative to the assumption of risk by the employee. Also that part relative to the delegation of duty by the employer to furnish a safe place for the employee to work. Also to that part of the charge relative to the duty to provide

for an inspection of the place of work, that is to say, the duty of the employer. And also that part of the charge where the jury are instructed that if they find the employer has furnished a missed-hole man, the miner then does not assume the risk of the dangers connected with the work. The defendant also excepts to the refusal of the Court to **[140]** charge the jury according to the first instruction submitted with reference to both cases.

Mr. WILSON.—We will except to the refusal of the Court to give Instructions No. 1; No. 4; No. 5; No. 6; No. 8; No. 9; No. 12; No. 17; No. 25; No. 26; No. 31; and No. 32, all and each of them being submitted to your Honor in both of the cases now on trial, and to the refusal of the Court to give instructions No. 2 and No. 4 of those separate instructions relative to the Reardon, No. 15,144.

The COURT.—Very well.

(RECITALS RELATIVE TO VERDICTS, JUDGMENTS, AND ORDERS DENYING PETITIONS FOR NEW TRIALS.)

(Whereupon the jury retired at 5:20 and returned into court at 6 o'clock with a verdict for the plaintiff in the amount of $5,000 in case No. 15,143; and $3,500 in case No. 15,144.)

That thereafter a judgment was entered in favor of plaintiff in each case upon such verdict, and it is further certified that within the time allowed by law and the orders of this Court, defendant duly filed its petition for a new trial herein, which petition came on duly and regularly for hearing and which was denied by the Court. **[141]**

Instructions to the Jury Requested by the Defendant and Refused.

Prior to the argument to the jury the defendant duly requested in writing that the Court should give to the jury the following instruction (the same being numbered 1 of the instructions requested by the defendant as above set forth):

> "You are instructed by the Court that on the evidence and under the law you will return a verdict in this case for the defendant."

Which request was refused, and to which ruling the defendant then and there excepted and now assigns the same as

ERROR NO. 40.

Prior to the argument to the jury the defendant duly requested in writing that the Court should give to the jury the following instruction (the same being numbered 4 of the instructions requested by the defendant as above set forth):

> "The mere fact of the happening of the accident in this case carries with it no presumption of negligence on the part of the defendant. The negligence of the defendant in this case is an affirmative fact for the plaintiff to clearly and certainly establish by a preponderance of evidence. The mere fact that the accident could have been avoided or prevented by the exercise of certain precautions, if that be true, is not sufficient in itself to establish that the accident complained of was caused by the negligence of the defendant."

Which request was refused, and to which ruling the defendant then and there excepted and now assigns the same as

ERROR NO. 41. **[142]**

Prior to the argument to the jury the defendant duly requested in writing that the Court should give to the jury the following instruction (the same being numbered 5 of the instructions requested by the defendant as above set forth):

> "If you find from the evidence in this case that the accident complained of was such as could, by no reasonable possibility, have been foreseen, and which no reasonable person could have anticipated,—in other words, that it was an inevitable accident,—then I charge you that your verdict must be for the defendant."

Which request was refused, and to which ruling the defendant then and there excepted, and now assigns the same as

ERROR NO. 42.

Prior to the argument to the jury the defendant duly requested in writing that the Court should give to the jury the following instruction (the same being numbered 6 of the instructions requested by the defendant as above set forth):

> "In determining in this case whether or not the defendant was negligent, the proper inquiry for you to make is *not* whether the accident might have been avoided if the defendant had anticipated its occurrence, but whether, taking the circumstances as they existed at the time

of the accident, the defendant was negligent in failing to anticipate and provide against the occurrence. The duty imposed does not require the use of every possible precaution to avoid injury to plaintiff, nor of any particular means which, it may appear after the accident, would have avoided it. The requirement **[143]** is only to use such reasonable precaution to prevent accidents as would have been adopted by ordinarily prudent persons in the same situation prior to the accident."

Which request was refused, and to which ruling the defendant then and there excepted and now assigns the same as

ERROR NO. 43.

Prior to the argument to the jury the defendant duly requested in writing that the Court should give to the jury the following instruction (the same being numbered 8 of the instructions requested by the defendant as above set forth):

"I charge you that the doctrine of law requiring an employer to furnish a safe place in which his employee may perform his work has no application where the place of work is not permanent or has not previously been prepared by the master as a place for doing the work, or in those cases where the employee is employed to make his own place to work in, or where the place is the result of the very work for which the servant is employed, or where the place is inherently dangerous and necessarily changes from time to time as the work progresses."

Which request was denied, and to which ruling the defendant then and there excepted and now assigns the same as

ERROR NO. 44.

Prior to the argument to the jury the defendant duly requested in writing that the Court should give to the jury the following instruction (the same being numbered 9 of the instructions requested by the defendant as above set forth): **[144]**

> "It is a rule applicable to cases of this character that the employer is not liable for dangers existing in the place where the employee is assigned to work, unless the employer knows of the dangers or defects or might have known thereof, if he had used ordinary care or skill to ascertain them, and I charge you that this rule applies with greater force in cases where the conditions surrounding the place of work are constantly changing, owing to the progress of the work, and in such cases the employee himself in the progress of the work is under as great an obligation as is the employer to be on the lookout for such dangers."

Which request was denied, and to which ruling the defendant then and there excepted and now assigns the same as

ERROR NO. 45.

Prior to the argument to the jury the defendant duly requested in writing that the Court should give to the jury the following instruction (the same being numbered 12 of the instructions requested by the defendant as above set forth):

"The standard of due care to be exercised by an employee is that degree that a prudent person would exercise for his own safety, but the necessity for greater or less care to avoid injury necessarily varies according to the hazards of the particular employment. Those engaged in extremely dangerous employments are required to adopt more precautions for their own safety than those engaged in less hazardous vocations, and I charge you that the occupation of a miner is extremely dangerous, and that an employee engaged in mining is required to use every great precaution to avoid an injury. A miner should be vigilant and careful in his own behalf and should use **[145]** a degree of care proportioned to the degree of danger in the ordinary discharge of his duties. In other words, he should exercise for his own protection that degree of care which is commensurate with the character of his occupation, and which a reasonably prudent person would use under like circumstances."

Which request was refused, and to which ruling the defendant then and there excepted and now assigns the same as

ERROR NO. 46.

Prior to the argument to the jury the defendant duly requested in writing that the Court should give to the jury the following instruction (the same being numbered 25 of the instructions requested by the defendant as above set forth):

"Again, while the evidence may tend to charge the employer with notice of incompetency, it may also become a 'two-*w*edged sword' and destroy the plaintiff's right of recovery, because, if the employee knew, or should have known, of his co-employee's incompetency, and neglected to call his employer's attention thereto, he is treated as being guilty of such contributory negligence by remaining in the employment, as prevents any recovery by him, and the very facts that tend to show knowledge on the employer's part may have the same result as to the injured employee."

Which request was refused, and to which ruling the defendant then and there excepted and now assigns the same as

ERROR NO. 47.

Prior to the argument to the jury the defendant duly requested in writing that the Court should give to the jury the following instruction (the same being numbered 26 of the instructions requested by the defendant as above set forth):

"If you find from the evidence in this case that the **[146]** defendant employed a man by the name of Yokum for the purpose of detecting missed shots after blasts in the faces of the drifts and cross-cuts in its mine, and if you further find that said Yokum was addicted to the use of intoxicants, then I charge you that before you can find a verdict in favor of Fred Whitsett and against the defendant on the ground that the defendant was negligent in em-

ploying or continuing in its employ said Yokum, you must further find from the evidence that Yokum was so addicted to the use of intoxicants that his ability to do his work had become practically impaired, or that he was intoxicated at the time that he made an inspection of the face of the cross-cut where the accident occurred, and in such event you must further find that the defendant knew, or by the exercise of reasonable care should have known, of the habits of Yokum and of his incompetence, and you must further find that the accident complained of was proximately caused by the incompetence of said Yokum and without contributory negligence on the part of Fred Whitsett. If you should find from the evidence that Yokum was an incompetent employee employed by the defendant to detect missed shots, and if you further find that it was also the duty of Fred Whitsett to examine for himself and determine whether or not there were missed shots, then and in that event I charge you that the plaintiff was not relieved from his duty to make such examination by the employment by the defendant of said Yokum, or by the fact that said Yokum had examined the face of the cross-cut where the accident occurred, prior to the time that said Fred Whitsett began work there, and that in such event it was the duty of Fred Whitsett to discover or detect the missed shot that caused the accident, and, failing in

this particular, your verdict must be for the [147] defendant.

"In the case brought by Reardon, for the death of Frank Whitsett, there is no charge in the complaint that the accident was proximately caused by the incompetence of Yokum or of a missed-shot detective, and I charge you that no recovery can be had in that case on that ground, or, if you should find that the accident was proximately caused by the negligence of Yokum or of some other missed-shot detective, or of the deceased in that case, then your verdict must be for the defendant."

Which request was refused, and to which ruling the defendant then and there excepted and now assigns the same as

ERROR NO. 48.

Prior to the argument to the jury the defendant duly requested in writing that the Court should give to the jury the following instruction (the same being numbered 31 of the instructions requested by the defendant as above set forth):

"If you find in this case that it was the duty of Frank Whitsett to look for and discover, if possible, missed shots in those places in the defendants' mine where he was engaged to labor, and if you further find that the accident complained of was caused by an unexploded blast that could have been discovered by said Frank Whitsett, in the exercise of ordinary care, or if you find that said unexploded blast was so concealed that it could not have been discovered

by said Frank Whitsett, by the exercise of ordinary care, then and in that event, I charge you that neither plaintiff can recover in these actions, and that your verdicts must be in favor of the defendant."

Which request was refused, and to which ruling the [148] defendant then and there excepted and now assigns the same as

ERROR NO. 49.

Prior to the argument to the jury the defendant duly requested in writing that the Court should give to the jury the following instruction (the same being numbered 32 of the additional instructions requested by the defendant as above set forth):

"If you find in this case that it was the duty of Fred Whitsett to look for and discover, if possible, missed shots in those places in the defendants' mine where he was engaged to labor, and if you further find that the accident complained of was caused by an unexploded blast that could have been discovered by said Fred Whitsett, in the exercise of ordinary care, or if you find that said unexploded blast was so concealed that it could not have been discovered by said Fred Whitsett, by the exercise of ordinary care, then and in that event, I charge you that neither plaintiff can recover in these actions, and that your verdicts must be in favor of the defendant."

Which request was refused, and to which ruling the defendant then and there excepted, and now assigns the same as

ERROR NO. 50.

Prior to the argument to the jury the defendant duly requested in writing that the Court should give to the jury the following instruction (the same being numbered 2 of the additional instructions requested by the defendant as above set forth):

> "If, upon a consideration of all the evidence in the case of Reardon, you should reach the conclusion that the plaintiff is entitled to your verdict, you must not arbitrarily **[149]** award him any amount within the sum demanded in the complaint, but the amount awarded by you must be such an amount only as will be a reasonable compensation to the father and mother of the deceased for the actual pecuniary loss sustained by them through the death of Frank Whitsett. In other words, in the event of your finding for the plaintiff, your verdict must be restricted in this case to that amount which the evidence shows that the deceased would have earned, and, after paying his own expenses for his food, lodging, clothing and the necessary and ordinary costs of living, would have given or turned over to his father and mother for their own use. The law measures the injury or loss sustained by the father and mother in a case of this kind in dollars and cents. In other words, the damages must be simply remunerative, and that remuneration must be restricted to that sum of money that will amount to the reasonable expectation that the father and mother had of pecuniary, or money, benefit arising from the continuance in life of the per-

son who was killed. The question is, what would the father and mother of the deceased, in all reasonable probability, have received pecuniarily by the continuance in life of the deceased? That is the question for you to determine in assessing damages in this case, should you determine that plaintiff is entitled to any damages whatsoever; and in passing upon the question of the amount, you are not allowed to speculate or indulge in presumptions or conjecture not warranted by the evidence, but you must determine the amount of damages solely by the evidence introduced before you in this case. If you are not able to determine from the evidence that the father and mother of the deceased have suffered a pecuniary injury or loss in the death of Frank Whitsett, then **[150]** it becomes your duty and you must return a verdict for the defendant."

Which request was refused, and to which ruling the defendant then and there excepted and now assigns the same as

ERROR NO. 51.

Prior to the argument to the jury, the defendant duly requested in writing that the Court should give to the jury the following instruction (the same being numbered 4 of the additional instructions requested by the defendant as above set forth):

"Nothing can be recovered in this action for any pain or suffering or injuries or damages sustained by the deceased Frank Whitsett."

Which request was refused, and to which ruling

the defendant then and there excepted, and now assigns the same as

ERROR NO. 52.

Dated this 22d day of December, 1912.

C. H. WILSON,
Attorney for Defendant. **[151]**

In the District Court of the United States for the Northern District of California, Second Division.

No. 15,144.

J. E. REARDON, Administrator of the Estate of FRANK WHITSETT, Deceased,

Plaintiff,

vs.

BALAKLALA CONSOLIDATED COPPER COMPANY, a Corporation, et al.,

Defendants.

Admission of Service [of Copy of Bill of Exceptions].

Due service and receipt of a copy of the within bill of exceptions, at San Francisco, California, is hereby admitted this 26th day of December, 1913.

C. S. JACKSON and
W. M. CANNON,
Attorneys for Plaintiff. **[152]**

In the District Court of the United States for the Northern District of California, Second Division.

No. 15,144.

J. E. REARDON, Administrator of the Estate of FRANK WHITSETT, Deceased,

Plaintiff,

vs.

BALAKLALA CONSOLIDATED COPPER COMPANY, a Corporation, et al.,

Defendants.

Stipulation [That Bill of Exceptions is Correct, etc].

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the respective parties to the above-entitled cause that the foregoing bill of exceptions is correct, and that the same may be certified and authenticated by the Honorable William C. Van Fleet, the Judge before whom said cause was tried, as a full, true and correct bill of exceptions.

Dated this 21st day of March, 1914.

C. S. JACKSON and
W. M. CANNON,
Attorneys for Plaintiff.
C. H. WILSON,
Attorney for Defendants. **[153]**

In the District Court of the United States for the Northern District of California, Second Division.

No. 15,144.

J. E. REARDON, Administrator of the Estate of FRANK WHITSETT, Deceased,

Plaintiff,

vs.

BALAKLALA CONSOLIDATED COPPER COMPANY, a Corporation, et al.,

Defendants.

Order Settling, etc., Bill of Exceptions.

That said bill of exceptions was duly prepared and submitted within the time allowed by the order of the Court, and is now signed, sealed and settled as and for the bill of exceptions in the above-entitled case, and the same is hereby ordered to be a part of the record in said action.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 23d day of March, 1914.

WM. C. VAN FLEET,

Judge.

[Endorsed]: Filed Mar. 24, 1914. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. **[154]**

In the District Court of the United States in and for the Northern District of California, Second Division.

No. 15,144.

J. E. REARDON, Administrator of the Estate of FRANK WHITSETT, Deceased,

Plaintiff,

vs.

BALAKLALA CONSOLIDATED COPPER COMPANY, a Corporation, et al.,

Defendants.

Petition for Writ of Error.

Now comes BALAKLALA CONSOLIDATED COPPER COMPANY, a corporation, defendant herein, and feeling itself aggrieved by the verdict of the jury and the judgment entered thereupon on the 23d day of May, 1912, whereby it was adjudged that plaintiff have and recover from defendant the sum of Three Thousand Five Hundred Dollars ($3,500.00) and costs and disbursements in this action, says that in said judgment and in the proceedings had prior thereunto in this cause, certain errors were committed to the prejudice of this defendant, all of which will more in detail appear from the Assignment of Errors, which is filed with this petition;

WHEREFORE, this defendant prays that a Writ of Error may issue in its behalf to the United States Circuit Court of Appeal, in and for the Ninth Circuit, and according to the laws of the United States in

that behalf made and provided, and that said defendant be permitted to prosecute the same to said last-mentioned court, for the correction of errors so complained of, and that a transcript of the record, proceedings [155] and papers in this cause, duly authenticated, may be sent to said last-mentioned court, and that an order be made fixing the amount of a supersedeas bond, which the defendant shall give and furnish upon said Writ of Error, and that upon the giving of said bond all further proceedings in this court be suspended, stayed and superseded until the determination of said Writ of Error by the said United States Circuit Court of Appeal in and for said Ninth Circuit. And your petitioner will ever pray.

Dated this 22d day of November, 1912.

C. H. WILSON,
CHICKERING & GREGORY,
Attorneys for Defendants.

Due service and receipt of a copy of the within petition for Writ of Error is hereby admitted this —— day of November, 1912.

C. J. JACKSON and
W. M. CANNON,
Attorneys for Plaintiff.

[Endorsed]: Filed Nov. 22d, 1912. W. B. Maling, Clerk. [156]

In the District Court of the United States in and for the Northern District of California, Second Division.

No. 15,144.

J. E. REARDON, Administrator of the Estate of FRANK WHITSETT, Deceased,

Plaintiff,

vs.

BALAKLALA CONSOLIDATED COPPER COMPANY, a Corporation, et al.,

Defendants.

Assignment of Errors.

Now comes defendant herein, BALAKLALA CONSOLIDATED COPPER COMPANY, a corporation, and in connection with its petition for a Writ of Error in the above-entitled cause, suggests that there was error on the part of the above-entitled court in regard to the matters and things hereinafter set forth, and specifies the following as errors upon which it will urge its Writ of Error in the above-entitled action, to wit: **[157]**

ASSIGNMENTS OF ERROR.

I.

That the District Court of the United States in and for the Northern District of California erred in permitting counsel for the plaintiff to state, in the presence of the jury, "In this case, there is certain indemnity insurance against this kind of action, and the insurance company is defending, through its own counsel, this action. Therefore, I have a right

to inquire." And that counsel for plaintiff was guilty of misconduct in making said statement in the presence of the jury. That defendant objected to said statement and to the conduct of counsel in making said statement, which objection was overruled by the Court and the defendant then and there excepted thereto, which exception was duly allowed by the Court.

II.

That on May 15th, 1912, and while the jury was being empaneled in the above-entitled action during the examination of N. S. Arnold, a talesman on his *voir dire* by counsel for plaintiff, the following proceedings were had:

"Mr. CANNON.—Q. Have you any connection, either as a stockholder or otherwise, with an indemnity company or insurance for the purpose of insuring people against personal injuries?

Mr. WILSON.—I object to that question as immaterial.

Mr. CANNON.—I do not think it is immaterial. I would like to state why I ask the question.

The COURT.—What is the reason?

Mr. CANNON.—The reason is—

Mr. WILSON.—I object to the reason being stated.

The COURT.—I am asking for it. [158]

Mr. CANNON.—In this case there is certain indemnity insurance against this kind of action and the insurance company is defending,

through its own counsel, this action. Therefore, I have a right to inquire.

Mr. WILSON.—I object to the statement made by counsel and assign it as error. It is an improper statement to make in this case.

Mr. WILSON.—We now move that the jury be discharged on the ground that improper and foreign matter has come to the knowledge of the jury.

The COURT.—The motion will be denied. I will instruct the jury to pay no attention to the remark of counsel unless it should appear it is a pertinent fact."

That the Court erred in refusing to discharge the jury on motion of defendants' counsel.

III.

The following question was then propounded to said N. S. Arnold, a talesman on his *voir dire.*

"Mr. CANNON.—Q. Have you any connection, either as a stockholder or otherwise, with any indemnity company as I have described?

Mr. WILSON.—We insist upon our objection.

The COURT.—I overrule the objection.

Mr. WILSON.—I will take an exception."

That the Court erred in permitting said question and in allowing counsel to bring before the jury notice and information of the fact that this action was defended by an indemnity company and that defendant was protected by indemnity insurance.

IV.

That, after the jury was sworn to try the above-entitled cause and before testimony was introduced

in said cause, defendant by its counsel, moved the Court for an order requiring that plaintiff [159] elect between the two causes of action set forth in the complaint, to wit: One cause of action stated in the only count of the complaint on the theory that defendant had failed to furnish a safe place in which to work, and the second in the same count on the theory that defendant had failed to furnish a competent co-employee, the violation of which one or either of these duties giving to the plaintiff a cause of action and each of them being separate dealings. That said motion, when made, was denied by the Court which ruling, defendant now assigns as error.

V.

That the Court erred in denying the motion of defendant for an order of the trial Court that plaintiff be restricted in his proof to the particular cause of action stated in his complaint, to wit: That the injury here complained of was approximately caused by the negligence of the defendant in failing to provide a careful and competent man, known as a "*miss*-hole man" or a "missed-sho*p* man." To which ruling, defendant duly and regularly excepted and now assigns as error.

VI.

That, during the trial of said action, Lawrence Whitsett, was called as a witness in behalf of plaintiff and was asked the following question:

> "Mr. CANNON.—Q. I will ask you, Mr. Whitsett, from your experience whether when there remains an unexploded blast or what is called a 'missed hole,' whether in driving an-

other hole in the vicinity of the 'missed hole' or one that is about to cross it or driven into it, there is danger under those circumstances of the 'missed hole' exploding?

"A. It is dangerous."

Defendant objected to this question and answer as immaterial and not the subject of expert testimony, which objection was overruled [160] and the defendant then and there duly excepted thereto, which ruling the defendant now assigns as error on the part of the trial Court.

VII.

The following question was then propounded to the said witness:

"Q. What was done with Fred after he was taken from the mine?

A. He was taken to the hospital.

Q. How was he taken to the hospital?

A. In a wagon."

That defendant objected to the last question and answer as immaterial, which objection was overruled and the defendant then and there excepted thereto. That the Court erred in allowing said witness to answer said question, and in overruling said objection.

VIII.

Said witness further testified that Fred Whitsett was taken to the hospital on the day of the accident.

"Q. He was fixed up—furnished with a cot?

A. They had a cot for him. Fred was put in a wagon on a cot."

Defendant objected to this question and answer on the ground that it was incompetent, irrelevant and

immaterial, and no part of the *res gestae.* The objection was overruled and the defendant then and there excepted thereto, which ruling the defendant now assigns as error on the part of the trial Court.

IX.

The following question was then propounded to said witness of and respecting Fred Whitsett, the plaintiff.

"Mr. CANNON.—Q. State what the manner and appearance of your brother at the present time is, physically and mentally as compared with his condition at and before the time of this accident.

A. He does not seem to have the mind he had before the accident. [161]

"Mr. WILSON.—Let me move to strike out the answer as not responsive and incompetent, no proper data laid for it.

The COURT.—It is not necessary, Mr. Wilson. You have your exception to the ruling."

That defendant objected to this question and answer as incompetent, irrelevant and immaterial, calling for the opinion of the witness, and no proper foundation made. The objection was overruled. The defendant then and there excepted thereto. That the Court erred in allowing said witness to answer said question and in denying defendant's motion to strike out said answer.

X.

The following question was then propounded to said witness:

"Q. Had you, prior to this accident, dis-

covered any 'missed holes' in the places where you were working? A. Yes, sir.

Q. Had you done anything with reference to these 'missed-holes'?

A. I reported them to the company."

That defendant objected to the last question and answer as immaterial, incompetent and irrelevant, and no part of the *res gestae.* Which objection was overruled. Defendant thereupon then and there excepted thereto. That the Court erred in allowing said witness to answer said question.

XI.

The following question was then propounded to said witness:

"Q. To what particular person in connection with the Company did you report these 'missed holes'? A. To B. Hall."

Defendant objected to this question and answer as immaterial, irrelevant and incompetent, and no part of the *res gestae,* which objection was overruled and the defendant then and there excepted thereto. That the Court erred in allowing said witness to [162] answer said question.

XII.

The following question was then propounded to said witness:

"Q. When he came back to work, what was his appearance?

A. Well, he would be intoxicated."

Defendant objected to this question and answer as immaterial. The objection was overruled and the defendant then and there excepted thereto. That

the Court erred in allowing said witness to answer said question.

XIII.

The following question was then propounded to said witness:

"Q. Was he, your father, at this time at the time of the accident to your brother or for several years prior thereto, able to work?

A. No, sir."

Defendant objected to this question and answer as incompetent, irrelevant and immaterial.

The objection was overruled and the defendant then and there excepted thereto.

That the Court erred in allowing said witness to answer said question.

XIV.

The following question was then propounded to said witness:

"Q. What was the condition of your father and mother with reference to their financial condition and their health and ability to earn money generally? A. They were very poor."

Defendant objected to this question and answer as irrelevant, incompetent and immaterial, not the proper proof of damages in the case, calling for the conclusion of the witness, and on the grounds shown in the California case of JOHNSON vs. BEADLE.

Objection was overruled and the defendant then and there excepted thereto. [163]

That the Court erred in allowing said witness to answer said question.

XV.

The following question was then propounded to said witness by the Court:

"Q. Would he go to cross-cuts where the holes had been exploded, or where they had not?

A. Where they had been exploded."

That defendant objected to this question and answer as leading, which objection was overruled, and the defendant then and there excepted thereto.

That the Court erred in asking and allowing said witness to answer said question.

XV½.

The following question was then propounded to said witness by the Court:

"Q. State, if you can, where he would go.

A. He would go to different cross-cuts and places through the mine."

Defendant thereupon moved that the answer to said question be stricken out as hearsay, and as a conclusion and opinion of the witness, which motion was denied by the Court.

That the Court erred in denying defendant's said motion to strike out.

XVI.

The following question was then propounded to said witness:

"Q. State what the practice was, Mr. Whitsett, with reference to what the men did in going back to work day by day or where they would go to work.

A. They would probably go to some other place. There is many places they are liable to take. Any place in the drift." [164]

Defendant objected to this question and answer as immaterial, which objection was overruled and the defendant then and there excepted thereto.

That the Court erred in allowing said witness to answer said question.

XVII.

Enos Wall, being called as a witness on behalf of the plaintiff, and the following question was then propounded to said witness:

"Q. To get him from the point where you found him to where the skip was, how did you have to go; where did you have to go?

A. We went from No. 4 out through No. 3 and to skip at No. 3 and down the main tunnel."

Defendant objected to this question and answer as incompetent, no part of the *res gestae* and matter occurring after the accident, which objection was overruled, and the defendant then and there excepted thereto.

That the Court erred in allowing said witness to answer said question.

XVIII.

The following question was then propounded to said witness:

"What kind of a wagon did you take him to the hospital in? A. It was a dead *X* wagon."

Defendant objected to this question and answer as immaterial, no part of the *res gestae,* no element of damage in the case, and incompetent. Which objection was overruled and the defendant then and there excepted thereto.

That the Court erred in allowing said witness to answer said question.

XX.

Ed Whitsett, called as a witness on behalf of the [165] plaintiffs, the following question was then propounded to said witness:

"Q. What appears to be his mental condition now with respect to memory and his mentality generally, as compared with what he was before the accident?

"A. Nothing at all. The mind isn't like it was before at all."

Defendant objected to this question and answer as incompetent under the pleadings, irrelevant, that there is nothing of that character alleged in the pleadings, and that this was a point attempted by defendant to be cured in the complaint at the time of the demurrer, which demurrer in this particular was overruled; which objection was overruled and the defendant then and there excepted thereto.

That the Court erred in allowing said witness to answer said question.

XXI.

That the following question was then propounded to said witness:

"Q. And what else is the trouble with your mother?

"A. Other ailments, I could not say what; that has been the principal thing, so the doctor told me."

Which answer defendant moved to strike out as hearsay, which motion was denied by the Court and

the defendant then and there excepted thereto.

That the Court erred in allowing said answer to stand and in denying said motion to strike out said answer.

XXII.

Fred Whitsett, called as a witness on behalf of the plaintiffs, the following questions were propounded to said witness.

"Q. You were under the influence of an anaesthetic? A. Yes, sir. [166]

"Q. What was the operation.

"A. Removing bones.

"Q. From your leg? A. Yes sir."

"Mr. WILSON.—It strikes me that the witness is unable to testify to that fact, if your Honor please. I move to strike it out.

"Q. By the Court: All you know you went on the table at 8 o'clock in the morning?

"A. Yes, sir."

That on defendant's motion to strike out said answer and said matter and facts, the Court denied said motion and defendant then and there excepted thereto.

That the Court erred in denying said motion to strike out.

XXIII.

That the following question was then propounded to said witness:

"Q. What was the total expense over and above what you were entitled to at the hospital?

"All over $248.00."

Defendant objected to this question and answer as

unfair to the witness, incompetent, irrelevant and immaterial,, and on the ground that plaintiff is entitled to recover the amount he himself spent or was spent on his account; which objection was overruled, and defendant then and there excepted thereto.

That the Court erred in allowing said witness to answer said question.

XXIV.

The following questions were propounded to said witness:

"Q. On the day of the operation at the hospital at the end of the operation at 6 P. M., what were they doing to you when you woke up?

"A. They were rubbing my arms.

"Q. How many were doing it?

"A. Three of them.

"Q. Three of them working on you?

"A. Yes, sir." [167]

"Mr. WILSON.—I move to strike that out as no part of the injury or damage, incompetent and irrelevant."

That defendant's motion to strike out, as above shown, was denied by the Court, and defendant then and there excepted to.

That the Court erred in denying defendant's said motion to strike out the answer to said questions and said matter.

XXV.

That thereafter and after the close of the testimony of Fred Whitsett, Mr. Cannon made the following offer in words following, to wit:

"Mr. CANNON.—We offer now in evidence, if your Honor please, the American Tables of Mortality to show the expectancy of life of these plaintiffs. It will not be necessary to introduce the whole table, will it?

"Mr. WILSON.—I have an objection, if your Honor please: We object to the table on the ground that under the facts shown in this case, it is incompetent, irrelevant and immaterial; citing your Honor to 17 CYC. 422, the case of VICKSBURG RAILWAY vs. WHITE."

That the Court overruled defendant's objection above shown, and admitted in evidence the American Tables of Mortality, and that defendant then and there excepted thereto.

That the Court erred in allowing said Tables of Mortality admitted in evidence.

XXVI.

That thereafter and after the plaintiffs had rested and after the admission in evidence of said Tables of Mortality the defendant moved to strike out all the testimony in the case as to the incompetency of the man Yokum, and all of the testimony in the case as to his being intoxicated or seen intoxicated [168] on the ground that it is not shown in the case that Yokum was intoxicated on the day of the accident, and that it was not by reason of the intoxication of Yokum that no proper inspection of the face of the drift was had, and that it is not shown that he had at any time on that day inspected the face in question, and that it is not shown that such evidence tended to prove the negligence or the incompetency

or the impairment of the ability of Yokum, and that it is not shown that it was by reason of Yokum's drinking habits that he was careless or unfit or ever at any time overlooked a "missed hole," and on the ground that it did not appear that Yokum had had anything to do with the work of inspecting the drift or face in which the accident occurred, and that it was not shown that a "missed shot" had been exploded, which caused the accident and injuries complained of.

That the Court denied said motion to strike out the evidence relating to said Yokum and as to his intoxication and incompetency, to which ruling the defendant then and there excepted.

That the Court erred in denying said motion to strike out said testimony.

XXVII.

That thereafter defendant made its motion for a nonsuit, on the grounds that the plaintiff had failed to substantiate the allegations of negligence in this case, upon the ground that the evidence fails to show any negligent act or omission on the part of the defendant proximately causing the accident and injury complained of; upon the further ground that it did not appear from the evidence in the case that the defendant negligently or carelessly omitted or failed to furnish a safe place in which to perform the work; upon the further ground that there is no evidence in the case that the [169] "missed-shot" man Yokum was habitually intoxicated, or that his services were rendered inefficient by reason of any intoxication upon his part, or that the defendant knew or

had reason to know of his habits of intoxication; on the further ground that it is not shown in the evidence that Yokum had anything to do with the inspection of the particular face in which the accident and injury complained of occurred.

That the Court denied said motion for a nonsuit, to which ruling the defendant then and there excepted.

That the Court erred in denying defendant's motion for a nonsuit.

XXVIII.

Ira L. Greninger, being called as a witness on behalf of the defendant, the following question was then propounded to said witness on cross-examination:

"Mr. CANNON.—Q. Supposing, Mr. Greninger, that the missed-hole man in performing his duties and going his rounds, found a place where the muck had been entirely removed, would it be his duty to examine that face for missing holes?

A. So far as he was able, yes."

That defendant then and there objected to this question and answer upon the ground that it did not appear whether the question is directed to a first examination the first time he saw this face after it was charged, or whether it was the second time; which objection the Court overruled, and the defendant then and there excepted thereto.

That the Court erred in allowing said witness to answer said question.

XXIX.

The following question was then propounded to said witness:

"Q. Your superiors gave no direction, made no written instructions or rules of any character for the safety of the [170] mine in the underground working of that mine? A. No, sir."

That defendant objected to said question and answer on the ground that it was immaterial and not cross-examination, and that said objection was overruled, and the defendant then and there excepted thereto.

That the Court erred in allowing said witness to answer said question.

XXX.

That the following question was then propounded to said witness:

"Q. To what shift boss did you ever give any instructions or directions that the 'missed-hole' man was only hired for protection to inexperienced men.

"A. My giving instructions to three or four hundred men at the same time having that many under me, I cannot call to mind any one instance or any instance by itself."

That defendant objected to this question and answer on the ground that it is not in itself an instruction, is incompetent, irrelevant and immaterial, and not cross-examination.

That said objection was overruled by the Court and defendant then and there excepted thereto.

That the Court erred in allowing said witness to answer said question. [171]

XXXI.

Christa B. Hall, being called as a witness on behalf of defendant, the following question was then propounded to said witness:

"Mr. CANNON.—Q. And did you not say to Mr. Greninger that you did not want to discharge him because they would give you an Italian, or some one who could not speak English, and you would have to go with him from place to place in the mine and show him what to do and that would make you back-track on your work? Did you not say that?

A. Not to Mr. Greninger."

That defendant objected to this question and answer on the grounds that there was no foundation laid for it and that while Mr. Greninger was on the stand, no such testimony was elicited, which objection was overruled and defendant then and there excepted thereto.

That the Court erred in allowing said witness to answer said question.

XXXII.

The following question was then propounded to said witness.

"Q. Then to whom?

A. I might have said it. I don't remember."

Defendant objected to this question and answer as incompetent, irrelevant and immaterial and not cross-examination, which objection was overruled and the defendant then and there excepted thereto.

That the Court erred in allowing said witness to answer said question.

XXXIII.

The following question was then propounded to said witness:

"Q. Have you not said to them in the presence of those three boys, leaving out Fred, in the presence of Lawrence Whitsett and Enos Wall, have you not said during this trial in San Francisco here that they wanted you to discharge Yokum because of his drinking [172] habits and you did not want to discharge him because they would give you an Italian or some one who could not speak English and you would have to go with the Italian and show him the things he would have to do and he would make you backtrack on your way, did you say that?

A. No, sir. Not in Frisco. I never said anything to Lawrence or Wall about it."

That defendant objected to this question and answer as irrelevant and incompetent, no proper foundation laid, and not cross-examination, and that the time, place and persons present were not specified, which objection was overruled and the defendant then and there excepted thereto.

That the Court erred in allowing said witness to answer said question.

XXXIV.

The following question was then propounded to said witness:

"Q. Did you say, what I have stated, to Lawrence or to Wall or to both of them anywhere else than in Frisco?

A. Not that I remember."

Defendant objected to this question on the ground that it is irrelevant and incompetent, no proper foundation laid, and not cross-examination, and that the time, place and persons present were not specified, which objection was overruled and the defendant then and there excepted thereto.

That the Court erred in allowing said witness to answer said question.

XXXV.

The following question was then propounded to said witness:

"Q. Did you not tell Enos Wall in the same conversation I have already mentioned in San Francisco since this trial started that Yokum was in the habit of hiding away from you in the mine, or words to that effect? A. I did not."

[173]

That defendant objected to this question and answer on the ground that it was incompetent, irrelevant and not cross-examination, and no proper foundation laid, time, place or persons present not being specified, which objection was overruled, and the defendant then and there excepted thereto.

That the Court erred in allowing said witness to answer said question.

XXXVI.

The following question was then propounded to said witness:

"Q. Did you not, between eight and ten on the night of the accident, take Frank to some other part of the mine to show him where to go to work after finishing the other two holes

or two holes and the part of a hole that was left to be done in that round? A. Fred."

Defendant objected to this question and answer as not cross-examination, which objection was overruled, and the defendant then and there accepted thereto.

That the Court erred in allowing said witness to answer said question.

XXXVII.

The following questions were then propounded to said witness:

"Q. Is it not a fact that Yokum was discharged within a week after this accident?

Mr. WILSON.—I object to that as immaterial.

The COURT.—The objection is overruled.

Mr. CANNON.—Q. Is that not a fact?

A. Yokum was discharged afterwards.

Q. Almost immediately after the accident?

A. He went on the other shift."

Defendant objected to these questions and answers on the ground that it was immaterial, and that the proper way to go at the matter was to ask the witness when Yokum was discharged, which [174] objection was overruled, and the defendant then and there excepted thereto.

That the Court erred in allowing said witness to answer said question.

XXXVIII.

The following question was then propounded to said witness:

"Q. You put him out from your shift on to the other shift?

A. I had orders from the other boss."

Defendant objected to this question and answer as immaterial, irrelevant, and not cross-examination.

The objection was overruled, and the defendant then and there excepted thereto.

That the Court erred in allowing said witness to answer said question.

XXXIX.

The following question was then propounded to said witness:

"Q. And after he got into the other shift, Greninger discharged him?

A. That is what Yokum told me."

Defendant objected to this question and answer as immaterial, irrelevant and not cross-examination.

The objection was overruled and the defendant then and there excepted thereto.

That the Court erred in allowing said witness to answer said question.

XL.

Prior to the argument to the jury, the defendant duly requested in writing that the Court should give to the jury the following instructions (the same being numbered 1 of the instructions requested by the defendant as above set forth):

"You are instructed by the Court that on the evidence and under the law, you will return a verdict in this case for the [175] defendant."

Which request was refused, to which ruling the

defendant then and there excepted and now assigns the same as ERROR NO. 40.

That the Court erred in refusing to give said instruction to the jury. **[176]**

XLI.

Prior to the argument to the jury the defendant duly requested in writing that the Court should give to the jury the following instruction (the same being numbered 4 of the instructions requested by the defendant as above set forth):

> "The mere fact of the happening of the accident in this case carries with it no presumption of negligence on the part of the defendant. The negligence of the defendant in this case is an affirmative fact for the plaintiff to clearly and certainly establish by a preponderance of evidence. The mere fact that the accident could have been avoided or prevented by the exercise of certain precautions, if that be true, is not sufficient in itself to establish that the accident complained of was caused by the negligence of the defendant."

Which request was refused, and to which ruling the defendant then and there excepted, and now assigns the same as ERROR NO. 41.

That the Court erred in refusing to give said instruction to the jury.

XLII.

Prior to the argument to the jury the defendant duly requested in writing that the Court should give to the jury the following instruction (the same be-

ing numbered 5 of the instructions requested by the defendant as above set forth):

> "If you find from the evidence in this case that the accident complained of was such as could, by no reasonable possibility have been foreseen, and which no reasonable person could have anticipated,—in other words, that it was an inevitable accident,—then I charge you that your verdict must be for the defendant."

Which request was refused, and to which ruling the defendant then and there excepted and now assigns the same as ERROR NO. 42. [177]

That the Court erred in refusing to give said instruction to the jury.

XLIII.

Prior to the argument to the jury the defendant duly requested in writing that the Court should give to the jury the following instruction (the same being numbered 6 of the instructions requested by the defendant as above set forth):

> "In determining in this case whether or not the defendant was negligent, the proper inquiry for you to make is *not* whether the accident might have been avoided if the defendant had anticipated its occurrence, but whether, taking the circumstances as they existed at the time of the accident, the defendant was negligent in failing to anticipate and provide against the occurrence? The duty imposed does not require the use of every possible precaution to avoid injury to plaintiff, nor of any particular means which, it may appear after the accident,

would have avoided it. The requirement is only to use such reasonable precaution to prevent accidents as would have been adopted by ordinarily prudent persons in the same situation prior to the accident."

Which request was refused, and to which ruling the defendant then and there excepted and now assigns the same as ERROR NO. 43.

That the Court erred in refusing to give said instruction to the jury.

XLIV.

Prior to the argument to the jury the defendant duly requested in writing that the Court should give to the [178] jury the following instruction (the same being numbered 8 of the instructions requested by the defendant as above set forth):

"I charge you that the doctrine of law requiring an employer to furnish a safe place in which his employee may perform his work has no application where the place of work is not permanent or has not previously been prepared by the master as a place for doing the work, or in those cases where the employee is employed to make his own place to work in, or where the place is the result of the very work for which the servant is employed, or where the place is inherently dangerous and necessarily changes from time to time as the work progresses."

Which request was denied, and to which ruling the defendant then and there excepted and now assigns the same as ERROR NO. 44.

That the Court erred in refusing to give the said

instruction to the jury. [179]

XLV.

Prior to the argument to the jury, the defendant duly requested in writing that the Court should give to the jury the following instruction (the same being numbered 9 of the instructions requested by the defendant as above set forth):

> "It is a rule applicable to cases of this character that the employer is not liable for dangers existing in the place where the employee is assigned to work, unless the employee knows of the dangers or defects or might have known thereof, if he had used ordinary care or skill to ascertain them, and I charge you that this rule applies with greater force in cases where the conditions surrounding the place of work are constantly changing owing to the progress of the work, and in such cases the employee himself in the progress of the work is under as great an obligation as is the employer to be on the lookout for such dangers."

Which request was refused, to which ruling the defendant then and there excepted and now assigned the same as ERROR NO. 45.

That the Court erred in refusing to give said instruction to the jury.

XLVI.

Prior to the argument to the jury, the defendant duly requested in writing that the Court should give to the jury the following instruction (the same being numbered 12 of the instructions requested by the defendant as above set forth):

"The standard of due care to be exercised by an employee is that degree that a prudent person would exercise for his own safety, but the necessity for greater or less care to avoid injury necessarily varies according to the hazards of the particular employment. Those engaged in extremely dangerous employments are required to adopt more precautions for their own safety than those engaged in less hazardous vocations, and I charge you that the occupation of a miner is extremely dangerous, and that an employee engaged in mining is required to use every great precaution to [180] avoid an injury. A minor should be vigilant and careful in his own behalf and should use a degree of care proportioned to the degree of danger in the ordinary discharge of his duties. In other words, he should exercise for his own protection that degree of care which is commensurate with the character of his occupation, and which a reasonably prudent person would use under like circumstances."

Which request was refused, to which ruling the defendant then and there excepted and now assigns the same as ERROR NO. 46.

That the Court erred in refusing to give said instruction to the jury.

XLVII.

Prior to the argument to the jury, the defendant duly requested in writing that the Court should give to the jury the following instruction (the same be-

ing numbered 25 of the instructions requested by the defendant as above set forth):

> "Again, while the evidence may tend to charge the employer with notice of incompetency, it may also become a 'two-edged sword' and destroy the plaintiff's right of recovery, because, if the employee knew, or should have known, of his coemployee's incompetency, and neglected to call his employer's attention thereto, he is treated as being guilty of such contributory negligence by remaining in the employment, as prevents any recovery by him, and the very facts that tend to show knowledge on the employer's part may have the same result as to the injured employee."

Which request was refused, to which ruling the defendant then and there excepted and now assigns the same as ERROR NO. 47.

That the Court erred in refusing to give said instruction to the jury.

XLVIII.

Prior to the argument to the jury, the defendant duly requested in writing that the Court should give to the jury the following [181] instruction (the same being numbered 26 of the instructions requested by the defendant as above set forth):

> "If you find from the evidence in this case that the defendant employed a man by the name of Yokum for the purpose of detecting missed shots after blasts in the faces of the drifts and cross-cuts in its mine, and if you further find that said Yokum was addicted to the use of in-

toxicants, then I charge you that before you can find a verdict in favor of Fred Whitsett and against the defendant on the ground that the defendant was negligent in employing or continuing in its employ said Yokum, you must further find from the evidence that Yokum was so addicted to the use of intoxicants that his ability to do his work had become practically impaired, or that he was intoxicated at the time that he made an inspection of the face of the cross-cut where the accident occurred, and in such event you must further find that the defendant knew, or by the exercise of reasonable care should have known, of the habits of Yokum and of his incompetence, and you must further find that the accident complained of was proximately caused by the incompetence of said Yokum and without contributory negligence on the part of Fred Whitsett. If you should find from the evidence that Yokum was an incompetent employee employed by the defendant to detect missed shots, and if you further find that it was also the duty of Fred Whitsett to examine for himself and determine whether or not there were missed shots, then and in that event I charge you that the plaintiff was not relieved from his duty to make such examination by the employment by the defendant of said Yokum, or by the fact that said Yokum had examined the face of the cross-cut where the accident occurred, prior to the time that said Fred Whitsett began work there, and

that in such event it was the duty of Fred Whitsett to discover or detect the missed shot that caused the accident, and, failing in this particular, your verdict must be for the defendant.

"In the case brought by Reardon, for the death of Frank [182] Whitsett, there is no charge in the complaint that the accident was proximately caused by the incompetence of Yokum or of a missed-shot detective, and I charge you that no recovery can be had in that case on that ground, or, if you should find that the accident was proximately caused by the negligence of Yokum or of some other missed-shot detective or of the deceased in that case, then your verdict must be for the defendant."

Which request was refused, to which ruling the defendant then and there excepted, and now assigns the same as ERROR NO. 48.

That the Court erred in refusing to give said instruction to the jury.

XLIX.

Prior to the argument to the jury the defendant duly requested in writing that the Court should give to the jury the following instruction (the same being numbered 31 of the instructions requested by the defendant as above set forth):

"If you find in this case that it was the duty of Frank Whitsett to look for and discover, if possible, missed shots in those places in the defendant's mine where he was engaged to labor, and if you further find that the accident

complained of was caused by an unexploded blast that could have been discovered by said Frank Whitsett, in the exercise of ordinary care, or if you find that said unexploded blast was so concealed that it could not have been discovered by said Frank Whitsett, by the exercise of ordinary care, then and in that event, I charge you that neither plaintiff can recover in these actions, and that your verdicts must be in favor of the defendant."

Which request was refused, and to which ruling the defendant then and there excepted, and now assigns the same as ERROR NO. 49.

That the Court erred in refusing to give said instruction to the jury. [183]

L.

Prior to the argument to the jury the defendant duly requested in writing that the Court should give to the jury the following instruction (the same being numbered 32 of the additional instructions requested by the defendant as above set forth):

"If you find in this case that it was the duty of Fred Whitsett to look for and discover, if possible, missed shots in those places in the defendant's mine, where he was engaged to labor, and if you further find that the accident complained of was caused by an unexploded blast that could have been discovered by said Fred Whitsett, in the exercise of ordinary care, or if you find that said unexploded blast was so concealed that it could not have been discovered by said Fred Whitsett, by the exercise

of ordinary care, then and in that event, I charge you that neither plaintiff can recover in these actions, and that your verdicts must be in favor of the defendant."

Which request was refused, and to which ruling the defendant then and there excepted and now assigns the same as ERROR NO. 50.

That the Court erred in refusing to give said instruction to the jury.

LI.

Prior to the argument to the jury the defendant duly requested in writing that the Court should give to the jury the following instruction (the same being numbered 2 of the additional instructions requested by the defendant as above set forth):

"If, upon a consideration of all the evidence in the case of Reardon, you should reach the conclusion that the plaintiff is entitled to your verdict, you must not arbitrarily [184] award him any amount within the sum demanded in the complaint, but the amount awarded by you must be such an amount only as will be a reasonable compensation to the father and mother of the deceased for the actual pecuniary loss sustained by them through the death of Frank Whitsett. In other words, in the event of your finding for the plaintiff, your verdict must be restricted in this case to that amount which the evidence shows that the deceased would have earned, and, after paying his own expenses for his food, lodging, clothing, and the necessary and ordinary costs of living,

would have given or turned over to his father and mother for their own use. The law measures the injury or loss sustained by the father and mother in a case of this kind in dollars and cents. In other words, the damages must be simply remunerative, and that remuneration must be restricted to that sum of money that will amount to the reasonable expectation that the father and mother had of pecuniary, or money, benefit arising from the continuance in life of the person who was killed. The question is, what would the father and mother of the deceased, in all reasonable probability, have received pecuniarily by the continuance in life of the deceased? That is the question for you to determine in assessing damages in this case, should you determine that plaintiff is entitled to any damages whatsoever; and in passing upon the question of the amount, you are not allowed to speculate or indulge in presumptions or conjecture not warranted by the evidence, but you must determine the amount of damages solely by the evidence introduced before you in this case. If you are not able to determine from the evidence that the father and mother of the deceased have suffered a pecuniary injury or loss in the death of Frank Whitsett, then it becomes your duty and you must return a verdict for the defendant."

Which request was refused, and to which ruling the [185] defendant then and there excepted and now assigns the same as ERROR NO. 51.

That the Court erred in refusing to give said instruction to the jury.

LII.

Prior to the argument to the jury, the defendant duly requested in writing that the Court should give to the jury the following instruction (the same being numbered 4 of the additional instructions requested by the defendant, as above set forth):

> "Nothing can be recovered in this action for any pain or suffering or injuries or damages sustained by the deceased Frank Whitsett."

Which request was refused, and to which ruling the defendant then and there excepted, and now assigns the same as ERROR NO. 52.

That the Court erred in refusing to give said instruction to the jury. **[186]**

LIII.

On the close of the testimony and before the jury retired for deliberation, the Court gave its certain instructions to the jury, and when said instructions of the Court were so given to the jury, and before the jury was retired for deliberation, the defendant duly excepted to the action of the Court in instructing the jury as follows:

> "In this connection, however, you will bear in mind that if you find that the defendant, in operating the mine in question, provided an inspector called a 'missed-hole man,' and that it was the duty of such employee to search for and discover missed holes or unexploded blasts, and to explode such blasts, or to report the existence thereof to his superior before the suc-

ceeding shift should go to work at any place where a round of blasts had been exploded, then any driller or chuck-tender regularly set at work by his superior at any place where it was the duty of such inspector to make such search and discover such unexploded blast, was entitled to assume that such inspector had done his duty in that regard, and to act upon that assumption, and would not be guilty of negligence for failing to make such inspection himself."

Upon the ground that the same is contrary to law, and which action of the Court in giving said instruction, defendant now assigns as ERROR NO. 53.

That the Court erred in giving said instruction to the jury.

LIV.

When said instructions were given to the jury, and before the jury retired for deliberation, the defendant duly excepted to the action of the Court in instructing the jury as follows:

"This obligation imposed upon an employer to use reasonable care in furnishing to his employee a safe place to work, and to keep that place reasonably safe, requires that where an employer places his employee at work in a place where danger to the employee [187] may be reasonably apprehended, and such danger may be avoided by reasonable and proper inspection of such premises, it is the duty of the employer to provide for such inspection, unless by the terms of his employment it is made the duty of the employee

to inspect it for himself, and if the employer fails to do so and in consequence thereof his employee, while engaged in the performance of his work, in reliance upon the master performing his duty in that respect, is injured in consequence of such neglect, and without fault on the part of the employee, the employer is liable to the employee for such injuries."

Upon the ground that the same is contrary to law, and which action of the Court in giving said instruction, defendant now assigns as ERROR NO. 52.

That the Court erred in giving said instruction to the jury.

LV.

When said instructions were given to the jury and before the jury retired for deliberation, the defendant duly excepted to the action of the Court in instructing the jury as follows:

"A servant does not assume risks resulting from the master's failure to so furnish a safe place to work, whether the performance of that duty is assumed by the master or is delegated to another. In other words, a servant, in the absence of agreement to the contrary, had the right to look to his employer for the furnishing of a safe place to work, and if the latter, instead of discharging that duty himself, sees fit to delegate it to another servant, he does not thereby alter the measure of his own obligation."

Upon the ground that the same is contrary to law, and which action of the Court in giving said instruction, defendant now assigns as ERROR NO. 53.

That the Court erred in giving said instruction to the jury.

LVI.

When said instructions were given to the jury, and before the jury retired for deliberation, the defendant duly excepted to the [188] action of the Court in instructing the jury as follows:

> "It is the duty of the master to use reasonable and ordinary care in furnishing a safe place for his employee in which to work, and whatever risk the employee assumes in carrying in the master's business will not exempt the master from that duty."

Upon the ground that the same is contrary to law, and which action of the Court in giving said instruction, defendant now assigns as ERROR NO. 54.

That the Court erred in giving said instruction to the jury.

LVII.

That said Court erred in overruling and denying the petition of the defendant for a new trial, which is as follows: [189]

(Title of Court and Cause.)

NOTICE.

To the Plaintiff in the Above-entitled Action, to William M. Cannon, Esq., and C. S. Jackson, Esq., His Attorneys:

You and each of you will please take notice that there is served herewith a copy of the petition of the defendant for a new trial in the above-entitled action, and that said defendant will move the Court

to grant a new trial upon the grounds set forth in said petition.

Dated July 5th, 1912.

C. H. WILSON,
CHICKERING & GREGORY,
Attorneys for Defendant.

(Title of Court and Cause.)

PETITION FOR A NEW TRIAL.

To the Honorable, the District Court of the United States, in and for the Northern District of California, Second Division:

The defendant in the above-entitled action hereby petitions for a new trial therein upon the following grounds:

1st: Irregularity in the proceedings of the jury by which the defendant was prevented from having a fair trial.

2d: Misconduct of the jury.

3d: Accident or surprise which ordinary prudence could not have guarded against.

4th: Excessive damages appearing to have been given under the influence of passion or prejudice.

5th: Insufficiency of the evidence to justify the verdict.

6th: That the verdict is against the law.

7th: Errors in law occurring at the trial.

The defendant hereby specifies the following particulars wherein the evidence is insufficient to justify the verdict: [190]

1st: That the evidence does not show any negligence on the part of the defendant contributing

proximately as a cause to the accident and injury complained of.

2d: That the evidence clearly shows that the accident and injury complained of were proximately caused by the negligence of Frank Whitsett.

3d: That the evidence clearly shows that the accident and injury complained of were proximately caused by the negligence of Fred Whitsett, a co-employee of the plaintiff.

4th: That the evidence clearly shows that the deceased Frank Whitsett assumed all risk of injury from unexploded blasts or missed shots while working in the mine of this defendant.

5th: That the evidence clearly shows that the damages awarded to the plaintiff are excessive.

SPECIFICATION OF PARTICULARS IN WHICH THE VERDICT IS AGAINST THE LAW.

1st: That the verdict is against the law in each and every and all of the particulars in which it is herein specified that the evidence is insufficient to justify the verdict.

2d: That the verdict is against the law, inasmuch as there is no evidence of any negligence on the part of the defendant contributing as a proximate cause to the accident and injury complained of by the plaintiff.

SPECIFICATION OF ERRORS OF LAW.

1st: It was error for the trial Court to permit counsel for the plaintiff to state in the presence of the jury that the defendant in this case was insured

against liability for the accident and injury complained of by the plaintiff, and that this action is defended by an accident insurance company. [191]

2d: It was error for the trial Court to fail and neglect to swear the jury to try this case according to the law.

3d: It was error for the trial Court to overrule defendant's objection to the question: "How was he taken to the hospital?" propounded to the witness Lawrence Whitsett.

4th: It was error for the trial Court to overrule the objection of the defendant to the following question, to wit: "What was the financial condition of your parents at the time of the death of the one brother and the injury to the other?" propounded to the witness Lawrence Whitsett.

5th: It was error for the trial Court to deny defendant's motion to strike out the answer to the following question propounded to the witness Lawrence Whitsett: "State if you can where he would go," said answer being, "He would go to different cross-cuts and places thru the mine; presumably that is his duty." And also in overruling defendant's objection to the following question propounded to the same witness: "State what the practice was, Mr. Whitsett, with reference to what the men did in going back to work day by day, and where they would go to work."

6th: It was error for the trial Court to overrule defendant's objection to the question propounded to the witness Wall, as follows: "What kind of a wagon did they take him to the hospital in?"

7th: It was error for the trial Court to overrule defendant's objection to the question propounded to the witness, Ed Whitsett, as follows: "Q. What appears to be his mental condition now with respect to memory and his mentality generally as compared with what he was before the accident?"

8th: It was error for the trial Court to overrule defendant's objection to the following question propounded to the witness Fred Whitsett: "Did you belong to an organization which **[192]** entitled you to such treatment at the hospital?"

9th: It was error for the trial Court to overrule defendant's objection and receive in evidence on behalf of plaintiff the American Tables of Mortality.

10th: It was error for the trial Court to deny defendant's motion to strike out all of the testimony as to the incompetency of the man Yokum and of all of the testimony as to his being intoxicated or being seen intoxicated.

11th: It was error for the trial Court to overrule defendant's motion for a nonsuit.

12th: It was error for the trial Court to overrule the objection of the defendant to the following questions propounded to the witness Greninger, to wit: "Q. Your superiors gave no direction, made no written instructions or rules of any character for the safety of the mine in the underground working of that mine?" And, "Q. To what shift bosses did you ever give any instructions or directions that the 'missed-hole' man was hired only for the protection to inexperienced men?"

13: It was error for the trial Court to overrule

defendant's objection to the following question propounded to the witness Hall, to wit: "Q. Have you not said to them in the presence of those three boys, leaving out Fred, in the presence of Lawrence Whitsett and Enos Wall; have you not said during this trial here in San Francisco that they wanted you to fire Yokum because of his drinking habits, and you did not want to discharge him because they would give you an Italian or someone who could not speak English and you would have to go with the Italian and show him the things he would have to do and he would make you back-track on your work; did you say that?"

14th: It was error for the trial Court to overrule [193] the defendant's objection to the following questions propounded to the witness Hall, to wit: "Q. State whether or not after this accident you transferred Yokum from your shift to the other shift?" And, "Q. And after he got in the other shift Greninger discharged him?"

15th: It was error for the trial Court to charge the jury as follows, to wit:

> "This obligation imposed on an employer to use reasonable care in furnishing to his employee a safe place to work, and to keep that place reasonably safe, requires that where an employer places his employee at work in a place where danger may be reasonably apprehended, and such danger may be avoided by reasonable and proper inspection of such premises, it is the duty of the employer to provide for such inspection, unless by the terms of his employment it

is made the duty of the employee to inspect it for himself, and if the employer fails to do so and in consequence thereof his employee engaged in the performance of his work, in reliance upon the master performing his duty in that respect, is injured in consequence of such neglect, and without any fault on the part of the employee, the employer is liable to the employee for such injuries."

16th: It was error for the trial Court to refuse to charge the jury according to defendant's first request as follows:

"You are instructed by the Court that on the evidence and under the *law will* return a verdict in this case for the defendant."

17th: It was error for the trial Court to refuse to charge the jury according to defendant's request as follows, to wit:

"The mere fact of the happening of the accident in this case carries with it no presumption of negligence on the part [194] of the defendant. The negligence of the defendant in this case is an affirmative fact for the plaintiff to clearly and certainly establish by a preponderance of evidence. The mere fact that the accident could have been avoided or prevented by the exercise of certain precautions if that be true, is not sufficient in itself to establish that the accident complained of was caused by the negligence of the defendant."

18th: It was error for the trial Court to refuse to

charge the jury according to the defendant's request as follows, to wit:

> "If you find from the evidence in this case that the accident in this case complained of was such as could, by no reasonable possibility have been foreseen, and which no reasonable person could have anticipated,—in other words, that it was an inevitable accident,—then I charge you that your verdict must be for the defendant."

19th: It was error for the trial Court to refuse to charge the jury according to defendant's request as follows, to wit:

> "In determining in this case whether or not the defendant was negligent, the proper inquiry for you to make is *not* whether the accident might have been avoided if the defendant had anticipated its occurrence, but whether, taking the circumstances as they existed at the time of the accident, the defendant was negligent in failing to anticipate and provide against the occurrence. The duty imposed does not require the use of every possible precaution to avoid injury to plaintiff, nor of any particular means which, it may appear after the accident, would have avoided it. The requirement is only to use such reasonable precaution to prevent accidents as would have been adopted by ordinarily [195] prudent persons in the same situation prior to the accident."

20th: It was error for the trial Court to refuse to charge the jury according to defendant's request, as follows, to wit:

"I charge you that the doctrine of law requiring an employer to furnish a safe place in which his employee may perform his work has no application where the place of work is not permanent or has not been previously prepared by the master as a place for doing the work, or in those cases where the employee is employed to make his own place to work in, or where the place is the result of the very work for which the servant is employed, or where the place is inherently dangerous and necessarily changes from time to time as the work progresses."

21st: It was error for the trial Court to refuse to charge the jury according to the defendant's request as follows, to wit:

"It is a rule applicable to cases of this character that the employer is not liable for dangers existing in the place where the employee is assigned to work, unless the employer knows of the dangers or defects or might have known thereof, if he had used ordinary care or skill to ascertain them, and I charge you that this rule applies with greater force in cases where the conditions surrounding the place of work are constantly changing owing to the progress of the work, and in such places the employee himself in the progress of the work is under as great an obligation as is his employer to be on the lookout for such dangers."

22d: It was error for the trial Court to refuse to charge the jury according to the defendant's request as follows, to wit:

"The standard of due care to be exercised by an employee is that degree that a prudent person would exercise for his own [196] safety, but the necessity for greater or less care to avoid injury necessarily varies according to the hazards of the particular employment. Those engaged in extremely hazardous employments are required to adopt more precautions for their own safety than those engaged in less hazardous vocations, and I charge you that the occupation of a miner is extremely dangerous and that an employee engaged in mining is required to use very great precaution to avoid an injury. A miner should be vigilant and careful in his own behalf and should use a degree of care proportioned to the degree of danger in the ordinary discharge of his duty. In other words, he should exercise for his own protection that degree of care which is commensurate with the character of his occupation and which a reasonably prudent person would use under like circumstances."

23d: It was error for the trial Court to refuse to instruct the jury according to the defendant's request as follows, to wit:

"Again, while the evidence may tend to charge the employer with notice of incompetency, it may also become a 'two-edged' sword and destroy the plaintiff's right of a recovery, because, if the employee knew, or should have known, of his coemployee's incompetency, and failed to call his employer's attention thereto, he

is guilty of such contributory negligence by remaining in the employment, as prevents any recovery by him, and the very facts that tend to show knowledge on the employer's part may have the same result as to the injured employee."

24th: It was error for the trial Court to refuse to instruct the jury according to defendant's request as follows, to wit:

"If you find from the evidence in this case that the defendant employed a man by the name of Yokum for the purpose of [197] detecting missed shots after blasts in the faces of the drifts and cross-cuts in its mine, and if you further find that said Yokum was addicted to the use of intoxicants, then I charge that before you can find a verdict in favor of Fred Whitsett and against the defendant on the ground that the defendant was negligent in employing or continuing in its employ said Yokum, you must further find from the evidence that Yokum was so addicted to the use of intoxicants that his ability to do his work had become permanently impaired, or that he was intoxicated at the time he made the inspection of the face of the cross-cut where the accident occurred, and in such event you must further find that the defendant knew, or by the exercise of reasonable care should have known, of the habits of Yokum and his incompetence, and you must further find that the accident complained of was proximately caused by the incompetence of said Yokum and without con-

tributory negligence on the part of Fred Whitsett. If you should find from the evidence that Yokum was an incompetent employee employed by the defendant to detect miss shots, and if you *further that* it was also the duty of Fred Whitsett to examine for himself and determine whether or not there were missed shots, then and in that event I charge you that the plaintiff was not relieved from his duty to make such examination by the employment of said Yokum by the defendant, or by the fact that said Yokum had examined the face of the cross-cut where the accident occurred, prior to the time that said Fred Whitsett began work there, and that in such event it was the duty of Fred Whitsett to discover or detect the missed shot that caused the accident, and, failing in this particular, your verdict must be for the defendant.

"In the case brought by Reardon, for the death of [198] Frank Whitsett, there is no charge in the complaint that the accident was proximately caused by the incompetence of Yokum or of a missed-shot detective, and I charge you that no recovery can be had in that case on that ground, or if you should find that the accident was proximately caused by the negligence of Yokum or of some other missed shot detective or of the deceased in that case, then your verdict must be for the defendant."

25th: It was error for the trial Court to refuse to charge the jury according to the defendant's request as follows, to wit:

"If you find in this case that it was the duty of Frank Whitsett to look for and discover, if possible, missed shots in those places in the defendant's mine where he was engaged to labor, and if you further find that the accident complained of was caused by an unexploded blast that could have been discovered by said Frank Whitsett, in the exercise of ordinary care, or if you find that said unexploded blast was so concealed that it could not have been discovered by said Frank Whitsett, by the exercise of ordinary care, then and in that event, I charge you that neither plaintiff can recover in these actions, and that your verdicts must be in favor of the defendant."

26th: It was error for the trial Court to refuse to charge the jury according to the defendant's request as follows, to wit:

"If you should find in this case that it was the duty of Fred Whitsett to look for and discover, if possible, missed shots in those places in the defendant's mine where he was engaged to labor, and if you further find that the accident complained of was caused by an unexploded blast that could have been discovered by said Fred Whitsett, in the exercise of ordinary care, or if you [199] find that said unexploded blast was so concealed that it could not have been discovered by said Fred Whitsett, by the exercise of ordinary care, then and in that event I charge you neither plaintiff can recover in these

actions and that your verdict must be for the defendant."

27th: It was error for the trial Court to refuse to charge the jury according to the defendant's request as follows, to wit:

"If, upon a consideration of all the evidence in the case of Reardon, you should reach the conclusion that the plaintiff is entitled to your verdict, you must not arbitrarily award him any amount within the sum demanded in the complaint, but the amount awarded by you must be such an amount only as will be a reasonable compensation to the father and mother of the deceased for the actual pecuniary loss sustained by them through the death of Frank Whitsett. In other words, in the event of your finding for the plaintiff, your verdict must be restricted in this case to that amount which the evidence shows the deceased would have earned, and after paying for his own expenses for his food, lodging, clothing and the necessary and ordinary costs of living, would have given or turned over to his father and mother for their own use. The law measures the injury or loss sustained by the father and mother in cases of this kind in dollars and cents. In other words, the damages must be simply remunerative, and that remuneration must be restricted to that sum of money that will amount to the reasonable expectation that the father and mother of pecuniary, or money, benefit arising from the continuance in life of the person who was killed.

The question is, what would the father and mother of the deceased, in all reasonable probability, have received pecuniarily by the continuance in life of the deceased? That is the [200] question for you to determine in assessing the damages in this case, should you determine that plaintiff is entitled to any damages whatsoever; and in passing upon the question of the amount, you are not allowed to speculate or indulge in presumptions or conjecture not warranted by the evidence, but you must determine the amount of damages solely by the evidence introduced before you in this case. If you are not able to determine from the evidence that the father and mother have suffered a pecuniary injury or loss in the death of Frank Whitsett, then it becomes your duty and you must return a verdict for the defendant."

28th: It was error for the trial Court to refuse to charge the jury according to the defendant's request as follows, to wit:

"Nothing can be recovered in this action for any pain or suffering or injuries or damages sustained by the deceased Frank Whitsett."

Said petition will be heard upon the pleadings and papers on file and upon the minutes of the Court and any notes and memoranda which may have been kept by the Judge, and also the reporter's transcript of his shorthand notes.

Dated this 5th day of July, 1912.

C. H. WILSON,
CHICKERING & GREGORY,
Attorneys for Defendant. [201]

Which action of said Court in overruling and denying defendant's petition for a new trial the defendant now assigns as ERROR NO. 57.

WHEREFORE, the said defendant, Balaklala Consolidated Copper Company, a corporation, prays that the judgment of the District Court of the United States, in and for the Northern District of California, Second Division, entered herein in favor of the plaintiff and against the defendant be reversed and that the said District Court of the United States, in and for the Northern District of California, Second Division, be directed to grant a new trial of said cause.

Dated this 22d day of November, 1912.

C. H. WILSON,
CHICKERING & GREGORY,
Attorneys for Defendant.

Due service of the within assignment of errors and receipt of a copy thereof is hereby admitted this 22d day of November, 1912.

C. J. JACKSON and
WM. M. CANNON,
Attorneys for Plaintiff.

[Endorsed]: Filed Nov. 22d, 1912. W. B. Maling, Clerk. [202]

In the District Court of the United States in and for the Northern District of California, Second Division.

No. 15,144.

J. E. REARDON, Administrator of Estate of FRANK WHITSETT, Deceased,

Plaintiff,

vs.

BALAKLALA CONSOLIDATED COPPER COMPANY, a Corporation, et al.,

Defendants.

Order Allowing Writ of Error and Fixing Amount of Supersedeas Bond.

Upon motion of C. H. Wilson, attorney for defendant herein, made this 22d day of November, 1912, and upon the filing of the said defendant's petition for the allowance of a writ of error intended to be urged by defendant, and upon the filing of the assignments of error by defendant;

IT IS ORDERED, and the Court hereby.

ORDERS, that a Writ of Error as prayed for in said petition be allowed and that the amount of the *supersedeas* bond to be given by defendant and upon said writ of error be, and the same is hereby fixed at the sum of Five Thousand Dollars ($5,000.00), and that upon the giving of said bond all further proceedings in this Court be suspended, stayed and superseded pending the determination of said writ of error by the United States Circuit Court of Appeal, in and for the Ninth Circuit.

Dated this 22d day of November, 1912.

WM. C. VAN FLEET,
Judge.

[Endorsed]: Filed Nov. 22, 1912. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [203]

In the District Court of the United States in and for the Northern District of California, Second Division.

No. 15,144.

J. E. REARDON, Administrator of the Estate of FRANK WHITSETT, Deceased,
Plaintiff,

vs.

BALAKLALA CONSOLIDATED COPPER COMPANY, a Corporation, et al.,
Defendants.

Supersedeas Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS: That we, Balaklala Consolidated Copper Company, a private corporation, defendant above named, as principal, and The Title Guaranty & Surety Company, a corporation created, organized and existing under and by virtue of the laws of the Commonwealth of Pennsylvania, as surety, are held and firmly bound unto J. E. Reardon, as Administrator of the Estate of Frank Whitsett, deceased, plaintiff above named, in the sum of Five Thousand Dollars ($5,000.00), to be paid to said J. E. Reardon, as Administrator of the Estate of Frank Whitsett, deceased, his executors or administrators, to which payment well and truly

to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our successors, representatives and assigns, firmly by these presents:

Sealed with our seals and dated this 22d day of November, 1912.

WHEREAS, the above-named defendant, Balaklala Consolidated Copper Company, a corporation, has sued out a writ of error to the [204] United States Circuit Court of Appeal, in and for the Ninth Circuit, to reverse the judgment entered in the above-entitled cause by the District Court of the United States, in and for the Northern District of California, Second Division, in favor of the above-named plaintiff and against the defendant therein for the sum of Three Thousand Five Hundred Dollars ($3,500.00), interest and costs.

NOW, THEREFORE, THE CONDITION OF THIS OBLIGATION is such that if the above-named Balaklala Consolidated Copper Company, a corporation, shall prosecute said writ of error to effect and answer all costs and damages, if it shall fail to make good its plea, then this obligation shall be void, otherwise to be and remain in full force and effect.

IN WITNESS WHEREOF, the said Balaklala Consolidated Copper Company, a corporation, and The Title Guaranty & Surety Company, a corporation created, organized and existing under and by virtue of the laws of the Commonwealth of Pennsylvania have caused these presents to be executed this

—— day of November, 1912.

BALAKLALA CONSOLIDATED COPPER COMPANY.

By CHICKERING & GREGORY,
Its Attorney.

THE TITLE GUARANTY & SURETY COMPANY.

[Seal] By C. F. MANNESS,
Attorney in Fact.

Approved:

WM. C. VAN FLEET,
Judge.

[Endorsed]: Filed Nov. 22, 1912. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [205]

[Certificate of Clerk U. S. District Court to Transcript of Record, etc.]

In the District Court of the United States in and for the Northern District of California, Second Division.

No. 15,144.

J. E. REARDON, Administrator of the Estate of FRANK WHITSETT, Deceased,
Plaintiff,

vs.

BALAKLALA CONSOLIDATED COPPER COMPANY, a Corporation, JOHN DOE and RICHARD ROE,
Defendants.

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of

California, do hereby certify the foregoing two hundred and five (205) pages, numbered from 1 to 205, inclusive, to be a full, true and correct copy of the record and proceedings in the above and therein entitled cause, as the same remains of record and on file in the office of the clerk of said court, and that the same constitutes the return to the annexed writ of error.

I further certify that the cost of the foregoing return to writ of error is $115.00, that said amount was paid by C. H. Wilson, attorney for the above-named defendant; and that the original writ of error and citation issued in said cause are hereto annexed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 9th day of May, A. D. 1914.

[Seal] WALTER B. MALING,

Clerk of the District Court of the United States, for the Northern District of California. [206]

[Writ of Error (Original).]

UNITED STATES OF AMERICA,—ss.

The President of the United States, to the Honorable, the Judges of the District Court of

[Seal] the United States, in and for the Northern District of California, GREETING:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between Balaklala Consolidated Copper Company, a corporation, plaintiff in error, and J. E. Reardon,

Administrator of the Estate of Frank Whitsett, deceased, defendant in error, a manifest error hath happened to the great damage of the said Balaklala Consolidated Copper Company, a corporation, plaintiff in error, as by its complaint appears.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, on the 21st day of December next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable WILLIAM C. VAN FLEET, United States District Judge, for the Northern District of California, [207] the 23d day of November, in the year of our Lord one thousand nine hundred and twelve.

[Seal] W. B. MALING,
Clerk of the District Court of the United States, in and for the Northern District of Califorina.

Allowed by:

WM. C. VAN FLEET,
Judge. [208]

Receipt of a copy of the within is hereby admitted this 23d day of November, 1912.

W. M. CANNON and
C. S. JACKSON,
Attorneys for Defendant in Error.

[Answer to Writ of Error.]

The Answer of the Judges of the District Court of the United States for the Northern District of California.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said Court, to the United States Circuit Court of Appeals for the Ninth Circuit, within-mentioned at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court.

[Seal] WALTER B. MALING,
Clerk.

[Endorsed]: No. 15,144. District Court of the United States, Northern District of California, Second Division. Balaklala Consolidated Copper Company, a Corporation, Plaintiff in Error, vs. J. E. Reardon, as Administrator of the Estate of Frank Whitsett, Deceased, Defendant in Error. Writ of Error. Filed Nov. 23, 1912. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [209]

Citation on Writ of Error [Original].

UNITED STATES OF AMERICA,—ss.

The President of the United States to J. E. Reardon, Administrator of the Estate of Frank Whitsett, Deceased, Greeting:

YOU ARE HEREBY CITED AND ADMONISHED to be and appear at a United States Circuit Court of Appeals, for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States, in and for the Northern District of California, Second Division, wherein Balaklala Consolidated Copper Company, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in this behalf.

WITNESS the Honorable WILLIAM C. VAN FLEET, United States District Judge, for the Northern District of California, this 22d day of November, A. D. 1912.

WM. C. VAN FLEET,
United States District Judge. [210]

Receipt of a copy of the within Citation is hereby admitted this 22d day of November, 1912.

W. M. CANNON and
C. S. JACKSON,
Attorneys for Plaintiff.

[Endorsed]: No. 15,144. District Court of United States, Northern District of California, Second Division. Balaklala Consolidated Copper Company, a Corporation, et al., Plaintiff in Error, vs. J. E. Reardon, Administrator of the Estate of Frank Whitsett, Deceased, Defendant in Error. Citation on Writ of Error. Filed Nov. 23, 1912. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [211]

[Endorsed]: No. 2420. United States Circuit Court of Appeals for the Ninth Circuit. Balaklala Consolidated Copper Company, a Corporation, Plaintiff in Error, vs. J. E. Reardon, Administrator of the Estate of Frank Whitsett, Deceased, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Northern District of California, Second Division.

Received and filed May 9, 1914.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

In the United States Circuit Court of Appeals, Ninth Circuit.

No. ——.

BALAKLALA CONSOLIDATED COPPER COMPANY, a Corporation,

Plaintiff in Error,

vs.

J. E. REARDON, Administrator of the Estate of FRANK WHITSETT, Deceased,

Defendant in Error.

Order Extending Time to [January 20, 1913, to] File Record Thereof and Docket Cause.

Good cause appearing therefor, it is ordered that the plaintiff in error in the above-entitled cause may have to and including January 20, 1913, within which to file its record on writ of error and to docket the cause in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated December 20, 1912.

WM. C. VAN FLEET,

United States District Judge for the Northern District of California.

[Endorsed]: No. 2420. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to Jan. 20, 1913, to File Record Thereof and to Docket Case. Filed Dec. 19, 1912. F. D. Monckton, Clerk.

In the United States District Court, for the Northern District of California, Second Division.

No. 15,144.

BALAKLALA CONSOLIDATED COPPER COMPANY, a Corporation,

Plaintiff in Error,

vs.

J. E. REARDON, as Administrator of the Estate of FRANK WHITSETT, Deceased,

Defendant in Error.

Order Extending Time to [February 19, 1913, to] File Record Thereof and Docket Cause.

Good cause appearing therefor, it is ordered that the plaintiff in error in the above-entitled cause may have to and including February 19, 1913, within which to file its record on writ of error and to docket the cause in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated January 18, 1913.

WM. W. MORROW,
Judge.

[Endorsed]: No. 2420. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to Feb. 19, 1913, to File Record Thereof and to Docket Case. Filed Jan. 18, 1913. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals, for the Ninth Circuit.

BALAKLALA CONSOLIDATED COPPER COMPANY, a Corporation,

Plaintiff in Error,

vs.

J. E. REARDON, as Administrator of the Estate of FRANK WHITSETT, Deceased,

Defendant in Error.

Order Extending Time to [March 20, 1913, to] File Record Thereof and Docket Cause.

Good cause appearing therefor, it is ordered that the plaintiff in error may have to and including March 20, 1913, within which to file its record on writ of error and to docket the cause in the United States Circuit Court of Appeals for the Ninth Circuit.

WM. W. MORROW,
United States Circuit Judge.

[Endorsed]: No. 2420. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to Mar. 20, 1913, to File Record Thereof and to Docket Case. Filed Feb. 19, 1913. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals, for the Ninth Circuit.

BALAKLALA CONSOLIDATED COPPER COMPANY, a Corporation,

Plaintiff in Error,

vs.

J. E. REARDON, as Administrator of the Estate of FRANK WHITSETT, Deceased,

Defendant in Error.

Order Extending Time to [April 18, 1913, to] File Record Thereof and Docket Cause.

Good cause appearing therefor, it is ordered that the plaintiff in error have to and including the 18th day of April, 1913, within which to file its record on writ of error and to docket the cause in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated March 19, 1913.

WM. C. VAN FLEET,

Judge.

[Endorsed]: No. 2420. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to April 18, 1913, to File Record Thereof and to Docket Case. Filed Mar. 19, 1913. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals in and for the Ninth Circuit.

BALAKLALA CONSOLIDATED COPPER COMPANY, a Corporation, et al.,

Plaintiffs in Error,

vs.

J. E. REARDON, Administrator of the Estate of FRANK WHITSETT, Deceased,

Defendant in Error.

Order Extending Time to [July 17, 1913, to] File Record Thereof and Docket Cause.

Good cause therefor appearing, it is hereby ordered that the plaintiffs in error may have to and including the 17th day of July, 1913, within which to file their record on writ of error and to docket this cause with the clerk of the above-entitled court.

WM. C. VAN FLEET,

Defendant in error hereby consents to the making of the above order.

C. S. JACKSON and
WM. M. CANNON,
Attorneys for Defendant in Error.

[Endorsed]: No. ——. In the United States Circuit Court of Appeals in and for the Ninth Circuit. Balaklala Consolidated Copper Co., a Corporation, et al., Plaintiffs in Error, vs. J. E. Reardon, Administrator of the Estate of Frank Whitsett, Deceased, Defendant in Error, Order Extending Time. Filed Apr. 18, 1913. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals in and for the Ninth Circuit.

BALAKLALA CONSOLIDATED COPPER COMPANY, a Corporation, et al.,

Plaintiffs in Error,

vs.

J. E. REARDON, Administrator of the Estate of FRANK WHITSETT, Deceased,

Defendants in Error.

Order Extending Time [to September 17, 1913, to File Record Thereof and Docket Cause].

Good cause therefor appearing, it is hereby ordered that the plaintiffs in error may have to and including the 17th day of September, 1913, within which to file their record on writ of error and to docket this cause with the clerk of the above-entitled court.

Dated this 17 day of July, 1913.

WM. W. MORROW,
U. S. Circuit Judge.

Defendant in error hereby consents to the making of the above order.

C. S. JACKSON and
W. M. CANNON,
Attorneys for Defendant in Error.

[Endorsed]: No. ——. Dept. No. ——. In the United States Circuit Court of Appeals in and for the Ninth District. Balaklala Consolidated Copper Co., etc., et al., Plaintiffs in Error, vs. J. E. Reardon, Administrator, etc., Defendant in Error. Order Ex-

tending Time. Filed Jul. 17, 1913. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals in and for the Ninth Circuit.

BALAKLALA CONSOLIDATED COPPER COMPANY, a Corporation, et al.,
Plaintiffs in Error,

vs.

J. E. REARDON, Administrator of the Estate of FRANK WHITSETT, Deceased,
Defendant in Error.

Order Extending Time [to September 18, 1913, to File Record Thereof and Docket Cause].

Good cause therefor appearing, it is hereby ordered, that the plaintiffs in error may have to and including the 18th day of September, 1913, within which to file their record on writ of error and to docket this cause with the clerk of the above-entitled court.

Dated at San Francisco, California, this 18th day of August, 1913.

WM. C. VAN FLEET,
Judge.

Defendant in error hereby consents to the making of the above order.

W. M. CANNON and
C. S. JACKSON,
Attorneys for Defendant in Error.

[Endorsed]: No. ——. In the United States Circuit Court of Appeals, for the Ninth Circuit. Balaklala Consolidated Copper Company, etc., et al., Plain-

tiffs in Error, vs. J. E. Reardon, Administrator of the Estate of Frank Whitsett, Deceased, Defendant in Error. Order Extending Time to File Writ of Error and to Docket Cause. Filed Aug. 18, 1913. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals in and for the Ninth Circuit.

BALAKLALA CONSOLIDATED COPPER CO., a Corporation, et al.,

Plaintiffs in Error,

vs.

J. E. REARDON, Administrator of the Estate of FRANK WHITSETT, Deceased,

Defendant in Error.

Order Extending Time [to October 20, 1913, to File Record Thereof and Docket Cause].

Good cause therefor appearing, it is hereby ordered that the plaintiffs in error may have to and including the 20th day of October, 1913, within which to file their record on writ of error and to docket this cause with the clerk of the above-entitled court.

Dated: September 17th, 1913.

WM. C. VAN FLEET,
United States District Judge.

Defendant in error hereby consents to the making of the above order.

W. M. CANNON and
C. S. JACKSON,
Attorneys for Defendant in Error.

[Endorsed]: No. ——. United States Circuit Court of Appeals, Ninth Circuit. Balaklala Consolidated Copper Company, etc., Plaintiff in Error, vs. J. E. Reardon, etc., Defendant in Error. Order Extending Time. Filed Sep. 8, 1913. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals in and for the Ninth Circuit.

BALAKLALA CONSOLIDATED COPPER CO. a Corporation, et al.,

Plaintiffs in Error,

vs.

J. E. REARDON, Administrator of the Estate of FRANK WHITSETT, Deceased,

Defendant in Error.

Order Extending Time [to November 20, 1913, to File Record Thereof and Docket Cause].

Good cause appearing therefor, it is hereby ordered that the plaintiffs in error may have to and including the 20th day of November, 1913, within which to file their record on writ of error and to docket this cause with the clerk of the above-entitled court.

Dated: October 20th, 1913.

WM. C. VAN FLEET,
United States District Judge.

Defendant in error hereby consents to the making of the above order.

W. M. CANNON and
C. S. JACKSON,
Attorneys for Defendant in Error.

[Endorsed]: No. ——. In the United States Circuit Court of Appeals in and for the Ninth Circuit. Balaklala Consolidated Copper Co., etc., et al., Plaintiffs in Error, vs. J. E. Reardon, Administrator of the Estate of Frank Whitsett, Deceased, Defendant in Error. Order Extending Time. Filed Oct. 20, 1913. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals in and for the Ninth Circuit.

BALAKLALA CONSOLIDATED COPPER CO., a Corporation, et al.,

Plaintiffs in Error,

vs.

J. E. REARDON, Administrator of the Estate of FRANK WHITSETT, Deceased,

Defendant in Error.

Order Extending Time [to December 20, 1913, to File Record Thereof and Docket Cause].

Good cause therefor appearing, it is hereby ordered, that the plaintiffs in error may have to and including the 20th day of December, 1913, within which to file their record on writ of error and to docket this cause with the clerk of the above-entitled court.

Dated this 19th day of November, 1913.

WM. C. VAN FLEET,
United States District Judge.

Defendant in error hereby consents to the making of the above order.

W. M. CANNON and
C. S. JACKSON,
Attorneys for Defendant in Error.

[Endorsed]: No. ——. In the United States Circuit Court of Appeals in and for the Ninth Circuit. Balaklala Consolidated Copper Co., a Corporation, et al., Plaintiffs in Error, vs. J. E. Reardon, Administrator of the Estate of Frank Whitsett, Deceased, Defendant in Error. Order Extending Time. Filed Nov. 20, 1913. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals in and for the Ninth Circuit.

BALAKLALA CONSOLIDATED COPPER CO., a Corporation, et al.,

Plaintiffs in Error,

vs.

J. E. REARDON, Administrator of the Estate of FRANK WHITSETT, Deceased,

Defendant in Error.

Order Extending Time [to December 27, 1913, to File Record Thereof and Docket Cause].

Good cause therefor appearing, it is hereby ordered, that the plaintiffs in error may have to and including the 27th day of December, 1913, within which to file their record on writ of error and to docket this cause with the clerk of the above-entitled court.

Dated this 20th day of December, 1913.

WM. C. VAN FLEET,
United States District Judge.

Defendant in error hereby consents to the making of the above order.

W. M. CANNON and
C. S. JACKSON,
Attorneys for Defendant in Error.

[Endorsed]: No. ——. In the United States Circuit Court of Appeals in and for the Ninth Circuit. Balaklala Consolidated Copper Co., etc., Plaintiff in Error, vs. J. E. Reardon, Administrator of the Estate of Frank Whitsett, Deceased. Defendant in Error. Order Extending Time. Filed Dec. 20, 1913. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals in and for the Ninth Circuit.

BALAKLALA CONSOLIDATED COPPER CO., a Corporation, et al.,

Plaintiffs in Error,

vs.

J. E. REARDON, Administrator of the Estate of FRANK WHITSETT, Deceased,

Defendant in Error.

Order Extending Time [to January 27, 1914, to File Record Thereof and Docket Cause].

Good cause therefor appearing, it is hereby ordered, that the plaintiffs in error may have to and including the 27th day of January, 1914, within which to file their record on writ of error and to docket this cause with the clerk of the above-entitled court.

Dated this 27th day of December, 1913.

WM. C. VAN FLEET,
United States District Judge.

Defendant in error hereby consents to the making of the above order.

W. M. CANNON and
C. S. JACKSON,
Attorneys for Defendant in Error.

[Endorsed]: No. 15,144. In the United States Circuit Court of Appeals in and for the Ninth Circuit. Balaklala Consolidated Copper Co., a Corporation, et al., Plaintiffs in Error, vs. J. E. Reardon, Administrator of the Estate of Frank Whitsett, Deceased, Defendant in Error. Order Extending Time. Filed Dec. 27, 1913. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals in and for the Ninth Circuit.

BALAKLALA CONSOLIDATED COPPER CO., a Corporation, et al.,

Plaintiffs in Error,

vs.

J. E. REARDON, Administrator of the Estate of FRANK WHITSETT, Deceased,

Defendant in Error.

Order Extending Time [to February 26, 1914, to File Record Thereof and Docket Cause].

Good cause therefor appearing, it is hereby

ORDERED, that the plaintiffs in error may have and they are hereby granted thirty (30) days from and after the 27th day of January, 1914, within which to file their record on writ of error and docket this cause with the clerk of the above-entitled court.

Dated this 27th day of January, 1914.

WM. C. VAN FLEET,
United States District Judge.

Defendant in Error hereby consents to the making of the above order.

C. S. JACKSON and
W. M. CANNON,
Attorneys for Defendant in Error.

[Endorsed]: No. ——. In the United States Circuit Court of Appeals in and for the Ninth Circuit. Balaklala Consolidated Copper Co., etc. et al., Plaintiffs in Error, vs. J. E. Reardon, Administrator, etc., Defendant in Error. Order Extending Time. Filed Jan. 27, 1914. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals in and for the Ninth Circuit.

BALAKLALA CONSOLIDATED COPPER COMPANY, a Corporation, et al.,

Plaintiffs in Error,

vs.

J. E. REARDON, Administrator of the Estate of FRANK WHITSETT, Deceased,

Defendant in Error.

Order Extending Time [to March 15, 1914, to File Record Thereof and Docket Cause].

Good cause appearing therefor, it is hereby ordered that the plaintiffs in error may have to and including the 15th day of March, 1914, within which to file their record on writ of error and to docket this cause with the clerk of the above-entitled court.

Dated February 26th, 1914.

M. T. DOOLING,

United States District Judge.

Defendant in error hereby consents to the making of the above order.

WM. M. CANNON and

C. S. JACKSON,

Attorneys for Defendant in Error.

[Endorsed]: No. ——. In the United States Circuit Court of Appeals in and for the Ninth Circuit. Balaklala Consolidated Copper Company, a Corporation, et al., Plaintiffs in Error, vs. J. E. Reardon, Administrator of the Estate of Frank Whitsett, Deceased, Defendant in Error. Order Extending Time. Filed Feb. 26, 1914. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals in and for the Ninth Circuit.

BALAKLALA CONSOLIDATED COPPER COMPANY, a Corporation, et al.,
Plaintiffs in Error,

vs.

J. E. REARDON, Administrator of the Estate of FRANK WHITSETT, Deceased,
Defendant in Error.

Order Extending Time [to April 15, 1914, to File Record Thereof and Docket Cause].

Good cause appearing therefor, it is hereby ordered that the plaintiffs in error may have to and including the 15th day of April, 1914, within which to file their record on writ of error and to docket this cause with the clerk of the above-entitled court.

Dated March 16th, 1914.

WM. C. VAN FLEET,
United States District Judge.

Defendant in error hereby consents to the making of the above order.

W. M. CANNON and
C. S. JACKSON,
Attorneys for Defendant in Error.

[Endorsed]: In the United States Circuit Court of Appeals in and for the Ninth Circuit. Balaklala Consolidated Copper Company, a Corporation, et al., Plaintiffs in Error, vs. J. E. Reardon, Administrator of the Estate of Frank Whitsett, Deceased, Defendant in Error. Order Extending Time. Filed Mar. 16, 1914. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals in and for the Ninth Circuit.

BALAKLALA CONSOLIDATED COPPER COMPANY, a Corporation, et al.,
Plaintiffs in Error,

vs.

J. E. REARDON, Administrator of the Estate of FRANK WHITSETT, Deceased,
Defendant in Error.

Order Extending Time [to May 10, 1914, to File Record Thereof and Docket Cause].

Good cause appearing therefor, it is hereby ordered, that the plaintiffs in error may have to and including the 10th day of May, 1914, within which to file their record on writ of error and to docket this cause with the clerk of the above-entitled court.

Dated April 10th, 1914.

WM. C. VAN FLEET,
United States District Judge.

Defendant in error hereby consents to the making of the above order.

C. S. JACKSON and
W. M. CANNON,
Attorneys for Defendant in Error.

[Endorsed]: No. ——. In the United States Circuit Court of Appeals in and for the Ninth Circuit. Balaklala Consolidated Copper Company, a Corporation, et al., Plaintiffs in Error, vs. J. E. Reardon, Administrator of the Estate of Frank Whitsett, Deceased, Defendant in Error. Order Extending Time. Filed Apr. 11, 1914. F. D. Monckton, Clerk.

No. 2420. United States Circuit Court of Appeals for the Ninth Circuit. Sixteen Orders Under Rule 16 Enlarging Time to May 10, 1914, to File Record Thereof and to Docket Case. Refiled May 9, 1914. F. D. Monckton, Clerk.